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THE
HEDAYA, OR GUIDE;
A
COMMENTARY
ON THE
MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE
GOVERNOR-GENERAL AND COUNCIL
OF
BENGAL,

BY
CHARLES HAMILTON.

VOL. III.

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THE
HEDAYA, OR GUIDE

TO THE
COMMONS

OF THE
MUSULMAN LAW

TRANSLATED BY ORDER OF THE

GOVERNOR-GENERAL AND COUNCIL

OF

INDIA

CHARLES WAMPTON

VOL. II.



C O N T E N T S

OF THE

T H I R D V O L U M E.

B O O K XXIII.

Of Agency.

Chap. I. Introductory,	- - -	Page 1
Chap. II. Of Agency for <i>Purchase</i> and <i>Sale</i> .		
Sect. I. Of Agency for <i>Purchase</i> ,	- - -	9
Sect. II. Of the Appointment of Agents by Slaves, for the Purpose of purchasing their Per- sons, in their own Behalf,	- - -	27
Sect. III. Of Agency for <i>Sale</i> ,	- - -	29
Sect. IV. Miscellaneous Cases,	- - -	39
Chap. III. Of Agents for <i>Litigation</i> and for <i>Seizin</i> ,	- - -	44
Chap. IV. Of the <i>Dismissal</i> of Agents,	- - -	56

C O N T E N T S.

B O O K XXIV.

Of *Dawee*, or *Claims*.

Chap. I.	Introductory,	- - - -	Page 63
Chap. II.	Of <i>Oaths</i> ,	- - - -	68
	Section.	Of the Manner of Swearing, and requiring an Oath,	- - - 77
Chap. III.	Of <i>Tabálif</i> ;	or the Swearing of both the Plaintiff and the Defendant,	- - 83
	Section.	Of Persons who are not liable to Claims,	101
Chap. IV.	Of Things claimed by two Plaintiffs,	- -	105
	Section.	Of Disputes concerning Possession,	- 122
Chap. V.	Of Claim of Parentage,	- -	124

B O O K XXV.

Of *Ikrár*, or *Acknowledgments*.

Chap. I.	Introductory,	- - - -	138
	Section.	(Concerning Acknowledgments with re- spect to <i>Embryos</i> .)	- - 142
Chap. II.	Of <i>Exceptions</i> ;	and what is deemed equivalent to <i>Exception</i> ,	- - 144
Chap. III.	Of Acknowledgments made by <i>sick</i> Persons,	-	161
	Section.	Miscellaneous Cases,	- - 168

B O O K XXVI.

Of *Soolh*, or *Compositions*.

Chap. I.	Introductory,	- - - -	175
	Section.		

CONTENTS.

Section.	(Miscellaneous,) - - -	Page 181
Chap. II.	Of <i>gratuitous</i> or <i>voluntary</i> Compositions; and of <i>Agents</i> for Composition, - - -	190
Chap. III.	Of Compositions for <i>Debt</i> , - - -	194
Section.	Of participated Debts, - - -	199
Section.	Of <i>Takhârij</i> , - - -	206

BOOK XXVII.

Of *Moxaribat*, or Copartnership in the Profits of Stock and Labour.

Chap. I.	Introductory, - - -	212
Chap. II.	Of a Manager entering into a Contract of <i>Moxâribat</i> with another, - - -	228
Section.	(Miscellaneous,) - - -	234
Chap. III.	Of the Dismission of a Manager; and of the Division of the Property, - - -	236
Chap. IV.	Of such Acts as may be lawfully performed by a Manager, - - -	241
Section.	(Miscellaneous,) - - -	250
Chap. V.	Of Disputes between the Proprietor of the Stock and the Manager, - - -	255

BOOK XXVIII.

	Of <i>Widda</i> , or <i>Deposits</i> , - - -	259
--	--	-----

BOOK XXIX.

	Of <i>Areeat</i> , or <i>Loans</i> , - - -	277
--	--	-----

BOOK

CONTENTS.

BOOK XXX.

Of *Hibba*, or *Gifts*, - Page 290

Chap. I.	Introductory,	-	-	-	291
Chap. II.	Of Retraction of Gifts,	-	-	-	300
	Section. (Miscellaneous,)	-	-	-	307
	Section. Of <i>Sàdka</i> , or <i>Alms-deed</i> ,	-	-	-	310

BOOK XXXI.

Of *Ijàrà*, or Hire, - 312

Chap. I.	Introductory,	-	-	-	313
Chap. II.	Of the Time when the Hire may be claimed,	-	-	-	316
	Section. (Miscellaneous,)	-	-	-	322
Chap. III.	Of Things the Hire of which is unlawful, or otherwise; and of <i>disputed</i> Hire,	-	-	-	324
Chap. IV.	Of <i>invalid</i> Hire,	-	-	-	334
Chap. V.	Of the Responsibility of a Hireling,	-	-	-	350
Chap. VI.	Of Hire on one of two Conditions,	-	-	-	355
Chap. VII.	Of the Hire of Slaves,	-	-	-	360
Chap. VIII.	Of Disputes between the <i>Hirer</i> and the <i>Hireling</i> ,	-	-	-	364
Chap. IX.	Of the Dissolution of Contracts of Hire,	-	-	-	366
	Section. Miscellaneous Cases,	-	-	-	373

BOOK XXXII.

Of *Mokatibs*, - 376

Chap. I.	Introductory,	-	-	-	377
	Chap.	-	-	-	

CONTENTS.

viii

Chap. II. Of invalid <i>Kitâbat</i> ,	Page 382
Chap. III. Of Acts unlawful to a <i>Mokâtib</i> , or otherwise,	391
Section. (Miscellaneous,)	397
Section. (Miscellaneous,)	402
Chap. IV. Of a Person transacting a <i>Kitâbat</i> on behalf of a <i>Slave</i> ,	411
Chap. V. Of the <i>Kitâbat</i> of <i>Partnership Slaves</i> ,	414
Chap. VI. Of the <i>Death</i> or <i>Insolvency</i> of the <i>Mokâtib</i> ; and of the <i>Death</i> of his <i>Master</i> ,	424

BOOK XXXIII.

Of <i>Willa</i> ,	436
Section. Of <i>Willa Mawalât</i> , or the <i>Willa</i> of <i>Mutual Amity</i> ,	448

BOOK XXXIV.

Of <i>Ikrab</i> , or <i>Compulsion</i> ,	452
Section. (Miscellaneous,)	459

BOOK XXXV.

Of <i>Hijr</i> , or <i>Inhibition</i> ,	468
Chap. I. Introductory,	469
Chap. II. Of Inhibition from weakness of Mind,	473
Section. Of the Time of attaining Puberty,	482
Chap. III. Of Inhibition on account of <i>Debt</i> ,	484

BOOK XXXVI.

Of <i>Mazoons</i> , or <i>Licensed Slaves</i> ,	493
Section. (Concerning a Licence to <i>Infants</i> ,)	518

CONTENTS.

BOOK XXXVII.

Of *Ghazb*, or *Usurpation*, - Page 522

Section. Of usurped Articles, altered by Acts of the Usurper, 532

Section. (Miscellaneous,) - - - 542

Section. Of the Usurpation of Things which are of no Value, 551

BOOK XXXVIII.

Of *Shaffa*, - - 561Chap. I. Of Persons to whom the Right of *Shaffa* appertains, 562Chap. II. Of *Claims* to *Shaffa*; and of Litigation concerning it, 569

Section. Of disputes relative to the Price, - 577

Section. Of the Articles in lieu of which the *Shaftee*may take the *Shaffa* property, - 581

Section. (Miscellaneous,) - - 586

Chap. III. Of the Articles concerning which *Shaffa* operates, 591Chap. IV. Of Circumstances which invalidate the right of *Shaffa*, 599

Section. (Miscellaneous,) - - 604

Section. Miscellaneous Cases, - - 607

BOOK XXXIX.

TRANS-

TRANSLATION

OF THE

H E D A R A.

COMMENTARY

ON THE

M U S S U L M A N L A W S.

B O O K XXIII.

Of A G E N C Y.

Chap. I. Introductory.

Chap. II. Of Agency for *Purchase* and *Sale*.

Chap. III. Of the appointment of Agents for *Litigation*, and for *Seizin*.

Chap. IV. Of the dismissal of Agents.

CHAP. I.

IT is lawful for a person to appoint another his agent, for the settlement in his behalf of every contract which he might have lawfully concluded himself, such as *sale*, *marriage*, and so forth; be-

Vol. III.

B

cause,

A person may lawfully appoint another his *Agent*, to act on his be-

half, in con-
tracts;

cause, as an individual is sometimes prevented from acting in his own person, in consequence of accidental circumstances, (such as sickness, or the like,) he is therefore admitted, of necessity, to appoint another his agent, in order that that person may expedite his wants by means of the powers which he derives from such appointment. It is, moreover, related in the *Nakl Sabeeh*, that the prophet appointed *Hakeem-Bin-Khirâm* his agent for purchase, in order that he might buy for him a camel to sacrifice;—and likewise, that he appointed *Amir-Bin-Aum* his agent for marriage, that he might conclude a marriage betwixt his mother and the prophet.

and for the
management
of suits,
or criminal
prosecutions;
or for the
payment or
exaction of
all rights
except re-
taliation or
punishment.

It is lawful for a person to appoint another his agent for the management of a suit relative to any rights whatever, (even to corporal punishment or retaliation,) for the reasons already alleged; and also, because every person is not himself capable of managing a business of this nature.—It is moreover recorded, in the *Nakl Sabeeh*, that *Alee* appointed *Akeel* his agent for the management of his suits, and that when *Akeel* became old he dismissed him, and appointed *Abdeola-Bin-Jâfir*.—In the same manner, also, it is lawful to appoint an agent for the payment of rights, or the exaction of them: excepting, however, in cases of punishment or retaliation, the appointment of an agent in which (as if an agent were appointed to exact those in the absence of his principal) is invalid; because punishment or retaliation are remitted in the existence of a doubt; and the absence of the principal creates a doubt; nay, the forgiveness of the prosecutor is probable in such a circumstance, for this reason, that it is praiseworthy and laudable to pardon: contrary to where the witnesses only are absent [from the execution,] as their non-retraction is most probable: and contrary, also, to where the prosecutor is present, as in this case there is no apprehension of his having forgiven.

OBJECTION.—In case of the presence of the principal, what necessity exists for the appointment of an agent?

REPLY.—Even in such case there may be a necessity for the appointment

pointment of an agent; because, as *every* person is not perfectly acquainted with the mode of exacting those rights, it follows that if the principal were debarred from the appointment of an agent, the door of exaction might be altogether closed.

—What is here advanced is according to *Haneefa*.—*Abou Yoosaf* alleges that agency for the establishment of corporal punishment or retaliation* (as if the agent should produce the witnesses) is not lawful.—The opinion of *Mohammed* coincides with that of *Haneefa*.—Some, however, maintain that he agrees with *Abou Yoosaf*.—Others, again, say that this disagreement subsists only in case of the *absence* of the constituent, and not in case of his *presence*; for, in this case, the agency is legal, according to all; because the words of an agent in the presence of his constituent refer entirely to the latter.—The argument of *Abou Yoosaf* upon this point is, that the appointment of an agent is the creation of a deputy, in which there is always room for doubt respecting the deputation; and as, in criminal prosecutions, every doubt must be avoided, it follows that the appointment of an agent for *prosecution* is invalid, in the same manner as for the exaction of punishment; and that it cannot be admitted; in the same manner as evidence to evidence, respecting the prosecution, is not admitted.—The argument of *Haneefa* is, that prosecution is merely a *condition* of the exaction of the right; because the necessity of the punishment is founded, not upon the *prosecution*, but upon the *criminality*, which is rendered manifest by the evidence of the witnesses: and hence agency is admitted in this case, in the same manner as in that of other rights.—A similar disagreement subsists with respect to the case of a man against whom an action inducing corporal punishment or retaliation lies, and who appoints an agent for the management of his defence.—The doctrine of *Haneefa*, however, is preferred in this instance, because the agent may make replies and rejoinders; and the doubt with respect to *deputation* (as before mentioned) does not prevent this.—If, however, the agent should make a con-

A person under accusation may employ an agent to conduct his defence.

* In other words, for conducting a criminal prosecution.

fession, it is not to be admitted against his constituent, because there exists a doubt of his having been authorised by his constituent to make such confession.

An agent cannot be appointed to manage a suit unless the constituent be sick, or absent,

It is not lawful, according to *Haneefa*, to appoint an agent for the management of a cause, unless with the consent of the adversary; excepting where the constituent is sick,—or distant three days journey, or further, from the place.—The two disciples maintain that such agency is lawful without the consent of the adversary; and *Shafei* is also of the same opinion. This disagreement does not relate to the legality of the agency itself, but to the necessity which operates upon the adversary to answer to an agent to whose appointment he has not assented; *Aboo Haneefa* being of opinion that he is not under such necessity; and the two disciples thinking otherwise.—The argument of the two disciples is that the appointment of an agent is the act of an individual in regard to a right purely *his own*; and therefore ought not to depend on the consent of another in the present instance, any more than in a case of exacting payment of debt.—*Haneefa*, on the other hand, argues that the constituent is himself under the necessity of giving an answer, and must attend in case the magistrate should summon him: now individuals differ with respect to their capacity of managing suits;—if, therefore, it were admitted that the appointment of an agent is absolute with respect to the adversary, this would be injurious to the adversary;—hence the validity of the appointment must be suspended on his consent:—in the same manner as where a partnership slave is made a *Mokâtib* by one of the partners, in which case it remains with the other partner to confirm the contract of *Kitâbit*, or to break it as he pleases; for, although the act of the first proprietor related purely to his own property, yet as the carrying of it into execution must have injured the right of the other, the validity of it is therefore suspended on his consent; and so also in the case in question.—It is otherwise where the person is *sick* or *absent*, for in this case his appointment of an agent is valid without the consent of the

the adversary, since he cannot himself be compelled to appear under such circumstances.—It is to be observed that in the same manner as *Haneefa* holds the appointment, in this particular, of an agent by an absent person to be valid, so also does he hold the appointment by one who is immediately about to travel.

or about to travel.

A WOMAN who remains in privacy, and is not accustomed to go to the court of the *Kazee*, ought (according to *Aboo Bekir*) to appoint an agent for the management of her cause; and acquiescence is incumbent on her adversary.—This doctrine has been adopted by our modern lawyers; and decrees are passed accordingly.

A woman may appoint an agent for litigation in all cases.

THE validity of agency, in any business, rests upon two conditions:—FIRST, that the constituent be himself legally empowered to perform the business for the execution of which he has appointed another: (for, as the agent derives his competency from the constituent, it is necessary that the constituent should himself be competent, before he confer the capacity on another;)—SECONDLY, that the agent be of sound understanding, in such a degree as may enable him to know and execute the business to which he has been appointed.—If, therefore, a person appoint a *child* or an *idiot* his agent, it is invalid; whereas, if a freeman, who is *adult* and of *sound judgment*, appoint his *fellow* * his agent,—or, if a privileged slave appoint his *fellow* his agent,—it is valid.

Agency, to be valid, must proceed from a competent constituent;

and must be vested in a person of understanding.

If a person appoint an infant who understands purchase and sale, or a *Mahjoor* (or *inhibited*) slave, to be his agent, it is in either case valid. The rights of the contract, however, do not appertain to *them* but to their *constituent*.—The reason of the validity of the appointment is that the *infant* is capable of explanation; and therefore his act is held to be valid, when done with the permission of his guardian;—and the *slave*

A *Mahjoor* slave, or an *infant* (capable of understanding) may be appointed an agent.

* Meaning, one who resembles him in those points.

but the obligations they enter into are not binding upon *them*, but upon their *constituent*.

is capable of acting, and is the master of his actions when they relate to himself, though not if they relate to his master; but agency for another does not relate to his master. The appointment of the infant or slave, therefore, is valid.—They are neither of them, however, capable of performing the obligations of the contract:—the *infant*, because of his want of competency;—and the *slave*, because it would interfere with the rights of his master;—the performance of the contract, therefore, rests with the constituent.—It is related as an opinion of *Abou Yoozaf*, that if an infant, or a slave, as above described, should make a sale, and the purchaser, being ignorant of their situation, should afterwards be informed of it, in that case it is in his option to annul the contract,—because having concluded the bargain on a supposition that they were competent to fulfil the rights of it, and being afterwards informed that the rights of the contract did not rest with them, he becomes of consequence entitled to annul it in the same manner as if he had discovered a defect in the subject of it.

Contracts concluded by agents are either such as the agent refers to himself,

THE contracts concluded by agents are of two kinds.—FIRST, such as the agent refers to himself; and which do not depend, in any degree, on the constituent; as in the cases of *sale* or *hire*, which relate to the *agent* and not to the *constituent*.—(*Shafei* maintains that the rights of sale appertain to the *constituent*; because the rights of a contract of sale are dependants of the *effects* of it; and as the *effect*, namely, *right of property*, appertains to the constituent, so in the same manner its *dependant* also appertains to him: an agent for sale, therefore, is the same as a *messenger*, or an agent for marriage.—The arguments of our doctors are that an agent is the contracting party, both in *reality* and in *effect*:—in *reality*, because the contract is formed by speech, and the speech of the agent is authentic because he is a *man*: and in *effect*, because, being himself competent, there is no necessity for the reference of the rights of the contract to the constituent; whereas, if he were merely a *messenger*, he would not be exempt from the necessity of referring the rights of the contract to the constituent,

constituent, as is the case with a messenger.—Now since such is the nature of agency, it follows that an agent is considered as a *principal* in regard to the rights of the contract; and hence *Kaddoree*, in the treatise which bears his name, says “an agent for sale delivers the goods and takes possession of the purchase money, and is liable to be sued for any defect in the subject of the sale;—and, on the other hand, “an agent for purchase receives the goods, and delivers the price, and may sue the seller for any defect in the goods;”—because all these are considered as the rights of sale. The constituent, moreover, is the proprietor of the thing purchased through his agent, *ab initio*; in the same manner as when a slave accepts a gift, or catches game, or gathers fire-wood; in all which cases the master is proprietor of the gift, of the game, or of the fire-wood, *ab initio*; that is to say, the property is not held first to rest in the slave, and then to shift to him.—This doctrine of the primary existence of the right of property in the constituent is approved:—contrary to *Koorokhee*, who maintains that, in consequence of the purchase, the right of property rests originally in the agent, and from him shifts to the constituent.)—SECONDLY, such as the agent refers the performance of to his constituent, and in which he has an immediate interest; such as marriage, *Khoola*, or composition for wilful murder; in all which cases, the rights appertain to the *constituent* and not to the *agent*.—Hence no demand can be made on the husband’s agent for the dower; nor can the wife’s agent be required to deliver over the dower to her husband; for in these cases the agent is a mere *messenger*, and is not exempt from the necessity of referring the performance to his constituent: for if the agent, in the case of marriage, were to refer the performance to himself, it would become *his* marriage, and not that of the *constituent*; (whence the necessity for considering him as a mere *messenger*.)—The reason of this is, that as none of these contracts are of a nature to admit of the *agent* first acting in them as a *principal*, he is therefore obliged to refer them to the constituent, and to act himself as a mere *messenger*.—Manumission for a compensation, contracts of *Kitabat*, and compositions.

compositions after *denial*, are all of the *second* class.—With regard to composition after *acknowledgment*, it is of the first class, as partaking of the nature of sale.—An agent for the delivery of a gift, or of charity, or for the restitution of a deposit, as being a mere *announcer*, is the same as a *messenger*. The case is also the same with regard to an agent for the execution of loans or pledges; because the *effect* of these (namely, the right of property) is established by means of the seizure of the thing given or bestowed in charity, and so on;—and as the thing, in these cases, belonged to the constituent and shifts to the donee or the other in consequence of the seizure, the agent, being as it were a mere *stranger* to the thing, cannot be considered as a *principal*, but must be regarded merely as an *explainer* or a *messenger*.—It is otherwise in *sale*, because the effect of sale is established by *speech*, and the agent is the *speaker*.—In the same manner, also, as an agent in the above cases of executing gifts, &c. is a mere *messenger*, so is an agent appointed by the petitioner, (or person to whom the gift, the charity, &c. is given.) The case is the same with respect to an agent for a contract of co-partnership or *Mozaribat*. With respect to an agent for the receipt of a loan, the appointment is null; inasmuch that, if a person, in virtue of such appointment, should receive a loan, and take possession of it, *he*, and not the *constituent*, would be the *proprietor* of it. It is otherwise with respect to a *messenger*; for the receipt of a loan by a messenger is lawful.

An agent cannot be appointed to receive a loan.

A debt contracted to an agent cannot be exacted by his constituent;

but if payment be made to the constituent, it is valid:

IF a constituent, in the case of having sold goods through his agent, should demand payment of the price from the purchaser, the purchaser may lawfully refuse to comply; because, with respect to the contract or its rights, the constituent is as a *stranger*, since the rights of the contract appertain to the contracting party. If, however, the purchaser pay the price to the constituent, it is lawful; nor is the agent afterwards entitled to demand it from him, since he has paid it to the constituent, to whom it of right belonged:—but if the agent persist in demanding it from him, then let him take it back from

from the constituent and pay it to the agent, and let the agent give it to the constituent; a mode in which there is evidently no advantage to any.—It is to be observed that as the right belongs to the constituent, the purchaser may, in case of the constituent being indebted to him, deduct the debt from the price. If, however, the constituent and agent be *both* indebted to him, he is only entitled to deduct from the price the debt of the *constituent*.—If, on the other hand, the *agent* only be indebted to him, he is at liberty (according to *Haneefa* and *Mohammed*) to deduct it from the price; because the agent (as they hold) may, if he please, exempt the purchaser entirely from the payment. In either case, however, (that is, whether the purchaser make a deduction on account of the debt due by the agent, or whether the agent exempt him entirely,) the agent is responsible for the whole to his constituent.

and the debtor may (in his payment) deduct a debt owing him by the constituent;

or by the agent, (when he alone is indebted to him.)

CHAP. II.

Of Agency for Purchase and Sale.

SECT. I.

Of AGENCY for PURCHASE.

WHEN a person appoints another his agent for purchasing some indefinite thing, it is necessary that he explain the *kind* and *quality* of the thing, or the *kind* and *price* of it; in order that the agent

VOL. III.

C

may

An agent must be properly instructed with respect to what he is to purchase,

may know the nature of the act for which he has been appointed, and thence become capable of executing it.

except where
his powers are
general.

If, however, a person appoint another an *absolute* agent, by saying to him, "purchase for me whatever thing you may judge advisable," in that case the explanation of the *kind*, &c. is unnecessary, because the constituent, in this instance, charges the agent with a discretionary care of his interests; and whatever he may then purchase is considered as in obedience to his order.—In fact, a *small* degree of uncertainty in agency (such as an uncertainty of the *quality*) is of no consequence, according to a favourable construction of the law; because agency is founded on liberal principles; and making an explanation of the *quality* an essential would be a restraint upon it.

An agency is
invalid where
the terms in
which it is
expressed
leave a *great*
degree of un-
certainty
with respect
to the *subject*
of it;

If the constituent, in the appointment of his agent, should use a word applicable to a variety of general kinds, such as *animal*,—or a word which serves to express a variety of meanings, such as *Dār**,—in this case the appointment of agency is invalid, even although the constituent may have specified the amount of the price; for articles of each kind may be purchased for the same price; and it is not known which kind the constituent wishes.—Hence the agency in this case, on account of the *great degree* of uncertainty, becomes impracticable. If, also, the word used be applicable to a *variety of species*, the agency is invalid, unless the constituent specify the price, or define the species, though he should not mention the goodness or badness of the *quality*. If, however, he specify the price, or define the quality, the agency is valid, because the *specification of the price* leads to a knowledge of the species; and the mention of the species leaves only the uncertainty of the *quality*; which is considered a degree of uncertainty so *trifling* as not to prevent the execution of the agency. Thus, if a person constitute another his agent for the purchase of "a *slave*, whether

* This word signifies a *house*, a *state*, and a variety of other meanings.

“male or female;” the agency is invalid, because “a slave, whether male or female,” applies to a variety of species. If, however, he explain the particular species, (such as *Turkish*, *Abyssinian*, *Indian*, or of a *mixed descent*,) the appointment is valid.—In the same manner, also, the appointment is valid where the price only is specified, because in that case (as was before explained) a small degree only of uncertainty remains.—It is recorded in the *Jama Sagheer*, that if a person desire another to purchase for him cloth, or an animal*, or a house, the agency is invalid, because of the great degree of uncertainty; as the term *dāba* (for instance) means every animal that moves on the face of the earth, although, in common acceptance, it signify either a horse, an ass, or a mule;—in the same manner, cloth is a generic term, applicable to a variety of species from the finest silks to the coarsest sheet of cotton; and the term house is applied to things which (with respect to species) are conspicuously different from each other, from a variety of causes, such as neighbourhood, the abundance or paucity of rights and privileges, or the situation in particular lanes or cities: from the great uncertainty in all these cases, therefore, the agency is invalid; but it becomes valid in case of an explanation of the price of the house, or the species of the cloth or animal.

If a person give another a hundred dirms, and say to him “buy for me, with these dirms, food;” in that case the word food is construed to mean wheat, or the flour of wheat, on a favourable construction.—Analogy would suggest the meaning to be any kind of food whatever, according to the real import of the word.—The reason for a more favourable construction, in this particular, is that the word *tāam* [food,] when used in purchase and sale, means (according to general custom,) wheat and the flour of it; and as general custom must be preferred to mere analogy, the law, for that reason, in all cases of purchase and sale, construes the word *tāam* [food] to mean wheat, or the flour of it.—Some have said that if the constituent, in this case, give many dirms, (ten, for instance,) then the word food is construed to

A power to purchase *tāam* [food] is restricted to the purchase of wheat or flour.

* Arab. *Dāba*.

mean *wheat*: if, on the other hand, he give a *few dirms*, (*three*, for instance,) it is construed to mean *bread made of wheat*; and if a *middle number*, (such as *seven*,) it is construed to mean the *flour* of wheat.

An agent may return goods purchased by him to the seller, on account of a defect;

but not after having delivered them to his constituent.

A right of pre-emption may be enforced against an agent before delivery to his constituent; but not afterwards.

Agency in *Sirf* or *Sillim* is valid.

If an agent, after purchase, discover a defect in the goods, he may then return them to the seller; because the rejection of the subject of sale on account of a defect is one of the rights of a contract of sale; and the agent, as being one of the *contracting parties*, is entitled to all the rights of the contract.—This, however, is only where the agent has not delivered over the goods to his constituent; for, after that, he cannot return it to the seller unless by permission of the constituent; because, after delivering the goods bought to his constituent, his agency ceases; and also, because, if he were then permitted to return the goods to the seller without the consent of the constituent, the seizure made by the constituent in his own behalf would be set at naught.—(It is to be observed that as, previous to the delivery of the goods to the constituent, the rights of the contract rest with the agent, and cease and expire after the delivery, it follows that if a person claim his right of *Shaffa** in a house purchased by an agent, he has a right to sue the agent previous to the delivery of the house to his constituent; but after the delivery no action would lie against the agent.)

If a person appoint an agent for executing a contract of *Sirf* or *Sillim*† it is valid; because the constituent being himself competent to these contracts may lawfully (on the principles already explained) empower another to execute them on his behalf. It is to be observed, however, that the *Sillim* here mentioned means a *purchase* by way of *Sillim* (or advance,) and not a *sale* by that mode; because, if a *sale* of that nature were allowed by agency, it would necessarily follow that

* A right of *neighbourhood*, which gives the neighbour a privilege of re-emption. —It is fully treated of under the head of *Shaffa*.

† See *Sales*.

the agent must himself become liable for a particular article in lieu of a price which he has not received.—It is likewise to be observed that if, in either of these cases, (that is, either the contract of *Sillim* or *Sirf*,) the agent (who is the *buyer*) be separated from the seller,—previous to his seizure of the goods, in the case of *Sillim*,—or, to the mutual seizure of the article of exchange in case of the *Sirf*,—the contract becomes null; because the agent being a party, his separation from the other party previous to the seizure is the cause of annulment of both contracts: (contrary to where the constituent is separated from the *seller* before the seizure; because not being himself a party, his separation is of no consequence.)—Since, therefore, the agent is a *party*, it follows that his seizure and delivery are valid, although he be one to whom the rights of a contract cannot appertain, (such as an *infant* or an *inhibited slave*.) It is different with regard to a *messenger* in a contract of *Sillim* or *Sirf*; for his seizure is not valid, as *his* function relates to the *contract* and not the *seizure*; because a messenger merely delivers the speech of his employer to another; and seizure is no way connected with speech. Moreover, a speech delivered by a messenger refers itself to the dictator of the message; a messenger is, therefore, not considered as a party; and hence his seizure, as being the seizure of a *stranger*, is not valid.

If an agent for purchase pay the price of the goods from his own property, and obtain possession of them, he is entitled to repayment from his constituent, for two reasons.—FIRST, he stands as a *seller*, and the constituent as a *purchaser*; because a virtual exchange is established between them; (whence it is that if an agent and his constituent disagree, with respect to the *price*, an oath is tendered to both, as holds in all mutual exchanges of property for property; and the constituent may also return the thing purchased to the agent, on account of any defect:)—when, therefore, the thing purchased is duly delivered to the constituent by the agent, the agent is entitled to take from him the price he may have given for it:—SECONDLY, as the rights

An agent, paying for goods with his own money, is entitled to repayment from his constituent.

rights of the contract appertain to the agent, and as the constituent is informed of this, it follows that he gives his consent to the agent's payment of the price from his own property. If, therefore, the goods be lost in the hands of the agent, and he should not previously have made a detention in his own behalf of those goods from his constituent, the loss in that case falls upon the constituent, and he becomes liable for the price to the agent; because the seizure of the agent, so long as he makes no formal detention of the purchase from his constituent, stands as the seizure of the constituent; and therefore he is held to have been virtually possessed of the goods whilst the loss took place.

An agent may detain from his constituent what he purchases, until he be paid the price:

AN agent is entitled to detain from his constituent any purchase he may have made on his account, until he be paid the price by him, according to what was before said, that the agent stands as the *seller*, and the constituent as the *purchaser*.—*Ziffer* maintains that the agent is not entitled to detain the purchase, as the constituent has already made seizure of it; because, as the seizure of the agent is, virtually, the seizure of the constituent, it is consequently the same as if the agent had actually delivered them over to him: the agent's right of detention, therefore, (in satisfaction of his claim to payment of the price,) ceases, in the same manner as in case of his actual delivery of them. Our doctors, on the other hand, argue that the delivery of the goods to the constituent (on the principle of the seizure of the agent being the seizure of the constituent) is a matter of necessity; but does not imply any consent on the part of the agent to the relinquishment of his right of detention.—The seizure of the agent, moreover, is not the *actual* seizure of the constituent; but is rather *suspended*.—If, therefore, the agent should not detain the goods from his constituent, his seizure stands as the seizure of his constituent; but if he detain them, his seizure is then considered as on his own behalf.

If, in the case before stated, the agent *detain* the purchase from his constituent, and it perish in his hands, he is answerable, according to *Abou Yoosaf*, in the same manner as for a *pledge**.—*Mohammed* is of opinion that he is answerable in the same degree as when goods, the subject of a sale, decay, or are lost, in the hands of the seller, in which case the responsibility is for the *price*, not for the *value*;—that is, the purchaser is exempted from the payment of the *price*;—and such is also the doctrine of *Haneefa*.—*Ziffer*, on the contrary, is of opinion, that responsibility attaches in the same degree as in a case of *usurpation*†; as the detention has been made without any right.—The argument of *Haneefa* and *Mohammed* is that the agent stands as the *seller* of the article in question to the constituent, and detains it from him in order that he may exact payment for it; and consequently that the constituent stands acquitted of the price on the decay or destruction of the article in the hands of the agent.—The reasoning of *Abou Yoosaf* is that the thing in question, in the hands of the agent, was not *at first* a subject of responsibility, but became so in consequence of detention with a view to satisfaction for the price; and the same is the actual property of a *pledge*:—contrary to a *purchase*; as that is a subject of responsibility in the hands of the seller *from the first*, and not because of detention for the price. A contract of sale, moreover, is cancelled in consequence of the loss of the subject of it; but in the case in question, the original contract between the agent and seller is not annulled.—*Haneefa* and *Mohammed*, however, maintain that though the original contract of sale be not annulled, yet the contract which virtually subsists between the agent and constituent is annulled, in the same manner as if the constituent were to return the goods to the agent on the discovery of a defect.

but if the purchase perish in the agent's hands during such detention, he is responsible.

* That is, not at the rate of the *estimated price*, but of the *actual value*.

† That is, at the rate of the *full value*, whatever that may be.

Case of an agent purchasing, at the rate of his instruction, a larger quantity of an article than was specified in the instruction.

110 If a person appoint another his agent for the purchase of ten *ratls** of flesh for one *dirm*, and the agent purchase twenty *ratls*, for one *dirm*, of that kind of flesh which is sold at the rate of ten *ratls* for one *dirm*; in that case (according to *Haneefa*) it is incumbent on the constituent to take only ten *ratls* for half a *dirm*. The two disciples maintain that it is incumbent on him to take the twenty *ratls* for one *dirm*. In some copies of *Kadooree* it is written that *Mohammed* coincides in opinion with *Haneefa*, and that his doctrine in the *Mabsoot* is not incompatible with it, he having only observed there, that “the constituent ought to take ten *ratls* for a half *dirm*.”—The argument of *Abou Yoosaf* is that the constituent ordered the agent to expend his *dirm* in the purchase of flesh, under a conception of the price being at the rate of ten *ratls* per *dirm*: when, therefore, the agent purchased twenty *ratls* for the *dirm*, as he appears to purchase them on account of his constituent, he is consequently entitled to take the whole; in the same manner as where a person empowers another to sell his slave for a thousand *dirms*, and the agent obtains two thousand; in which case the constituent is entitled to the whole of the sum so obtained.—The argument of *Haneefa* is that the constituent having expressly enjoined the purchase of ten *ratls*, it follows that the excess must be considered as having been purchased by the agent on account of himself,—and for which he must accordingly pay the price:—contrary to where an agent, being empowered to sell a slave for a thousand *dirms*, obtains two thousand for him; because, in this case, the excess being in exchange for the property of the constituent, is consequently his right.—If, however, the agent were to purchase for one *dirm* twenty *ratls* of flesh of that kind which is sold at the rate of twenty *ratls* per *dirm*, the purchase (in the opinion of all our doctors) is made by the agent for himself; because the object of the constituent was evidently *fat* meat, and that object has not been here obtained.

* A *ratl* is about one pound, *Troy* weight.

IF a person appoint another his agent to purchase for him some specific article, in that case the agent is not entitled to purchase the article for *himself*; because this is a breach of the trust reposed in him by his constituent; and also, because it is a dismission of himself from his appointment, which he is not (in the opinion of some) empowered to do, unless in the presence of his constituent.—If, however, the constituent should have specified the price of the article, and the agent purchase it for a price of a different species from that mentioned by the constituent; or if, the constituent not having specified the price, the agent purchase the article, not for *dirms*, but for something estimable by weight or measurement of capacity; or, lastly, if the agent appoint another agent, and that secondary agent purchase the article in the absence of the primary agent; in all these cases the purchase is held to have been made on behalf of the agent himself, and not of his constituent, because of the deviation from his constituent's orders.—If, on the other hand, the *secondary* agent conclude the bargain in the presence of the *primary* agent, the purchase is in that case considered as made for the constituent, because the wisdom and judgment of the primary agent is held (in consequence of his presence) to have been exerted; and hence there is no deviation from the orders of his constituent.

An agent cannot purchase for himself any specific article which he is directed to purchase for his constituent;

unless he purchase it for something of a different nature from the price specified;

or through the mediation of another agent.

IF a person appoint another to purchase for him an indefinite slave, and the agent accordingly purchase a slave; in that case the slave belongs to the agent himself*, unless he declare “I intended the purchase for my constituent,”—or unless he make the purchase with the constituent's property.—The compiler of the *Hedaya* remarks that this case may occur in various shapes.—FIRST, where the agent refers the contract to his *constituent's* money, as if he should say “with this thousand *dirms* (meaning those of his constituent) I have pur-

Case of agency in the purchase of an indefinite slave;

which admits of four descriptions.

* That is, the agent is considered as having made the purchase on *his own* account, and consequently must pay the price out of *his own* property.

“chased this slave;” in which case the slave goes to the constituent. (This is the case which is meant by the above expression “or unless he make the purchase with the constituent’s property;” for that does not mean “that he shall first make the purchase for a thousand *dirms*, generally, and then pay it from the property of his constituent.”)—SECONDLY, where the agent refers the contract to his *own* money; in which case, the slave, for evident reasons, belongs to the agent himself, since he has referred the contract to his *own* property.—THIRDLY, where the agent refers to *money in general*; in which case the purchase is made either for himself or his constituent, as he may have resolved in his mind at the time;—because the agent, in a case of the present description, is at full liberty either to make the purchase for himself, or for his constituent. If, therefore, the agent and constituent disagree, (the agent asserting that he intended the purchase for himself, and the constituent declaring that he intended it for *him*,) then the payment of the price must determine; that is, the slave is adjudged to him from whose property the price is paid.—If, on the other hand, it be admitted by both that no resolution was formed, *Mohammed* alleges the slave, in this case, to be the property of the *agent*; because of his being the contracting party, and also, because of the probability there is that every one acts for himself, unless where it can be proved to the contrary, which the case in question does not admit of.—*Aboo Yoosaf* is also of opinion that the *payment of the price* ought to determine the right to the purchase; because it serves as a criterion to determine the action of the agent, which otherwise admits of two suppositions; and also, because, if the purchase were to be considered as made on account of the agent, notwithstanding his having paid the price from the property of the constituent, it would follow that the agent is an *usurper*. This conclusion of *Aboo Yoosaf*, however, (that the agent would, under these circumstances, be an *usurper*,) does not necessarily follow: on the contrary, he cannot otherwise be considered than as in the case where the parties disagree with respect to the *intention*; which

we

we have already explained.—It is to be observed that all the several modes here described apply equally to the appointment of an agent for the management of a contract of *Sillim*.

If a person appoint another to purchase for him a slave for a thousand *dirms*, and the agent afterwards inform him that “he had accordingly purchased for him a slave for a thousand *dirms*, but that the slave had died in his possession,”—and the constituent, on the other hand, assert that “he had purchased the said slave for *himself* and not for *him*,”—in this case the assertion of the constituent, corroborated by an oath, must be credited.—This, however, proceeds on a supposition that the constituent had not previously delivered the said thousand *dirms* to his agent:—for if he should have given the thousand *dirms*, the declaration of the *agent* must be credited; because, in the former instance, the agent gives information of his performance of an act which he is not now capable of carrying into full execution, (since he cannot purchase a slave who is *dead*,) and his object is to get a thousand *dirms* from the constituent, who, on the other hand, denies his right; and the word of a defendant is creditable before that of a plaintiff: and, in the latter instance, the agent is a *trustee*, having the price in his hands as a *deposit*; and his object being to obtain a release from his trust, his assertion is therefore credited.—If, however, the slave be actually *alive* at the time of the disagreement, the declaration of the agent must be credited, (according to *Haneefa* and *Mohammed*,) whether the constituent have delivered the price or not; because the agent gives information of his having performed an act which he is capable at that instant of carrying fully into execution, (since it is in his power to purchase this slave, as he is *living*,) and hence his word is not liable to suspicion.—According to *Haneefa*, indeed, if the constituent should *not* have delivered the price, *his* assertion must be credited, as the agent is in this case liable to the suspicion of having first purchased the slave on account of *himself*, and asserting afterwards (on the discovery of a defect) that he has purchased

Case of dispute between the agent and constituent respecting a slave who, after being purchased by the agent, dies in his hands.

him for his *constituent*. It is otherwise where he has already received the purchase-money, because then he is considered as a *trustee* of it, and his assertion is credited, as it tends to procure him a releasement from his trust:—whereas, in the other case, he cannot be considered as a *trustee*, since the purchase-money is not in his possession.

In a case of dispute between an agent and constituent respecting the purchase of a specific slave, the declaration of the agent must be credited.

If a person desire his agent to purchase for him a specific slave, and they afterwards disagree during the life-time of the slave, (the constituent asserting that the agent had purchased him for *himself*, and the agent declaring that he had purchased him for his *constituent*,) in this case it is universally agreed that, whether the constituent may have delivered to him the price or not, the assertion of the agent must be credited; because the agent gives information of his performance of an act which he is at that moment capable of carrying fully into execution; and also, because he is not in this case liable to any suspicion, since an agent for the purchase of a specific thing cannot purchase that thing for himself in the absence of his constituent, for the reasons already explained: in opposition to the case of an *indefinite* thing, (according to the doctrine of *Hanefa*, as exhibited above.)

An agent, avowing his commission, cannot afterwards retract, unless the alleged constituent *deny* the commission.

If one person say to another “sell to me this slave in behalf of Omar, who is my constituent;” and the slave be accordingly sold, and the agent afterwards deny that he had been authorised to make the purchase by Omar, and Omar then appear, and assert that he had desired the said agent to purchase the said slave for him,—in this case Omar is entitled to take the slave, because the agent has himself acknowledged his agency on his behalf, and denial after acknowledgment is of no effect.—If, on the other hand, Omar should *deny* his having authorised the purchase, in that case he is not entitled to take the slave, because the acknowledgment of the agent is set aside by the denial of Omar.—But if, under these circumstances, the purchaser should deliver the slave to Omar, it becomes then a contract of sale, for which the original purchaser is responsible, seeing

seeing that *Omar* has purchased it from him after the mode of *Taata*, that is by mutual gift, as when a person buys a thing for another without his authority and then delivers the said thing to that other.—The doctrine of this case shews that the delivery of a thing according to sale, suffices to establish a sale by *Taata* or mutual gift, even although the giving and receiving of the price should not have taken place; and it also shews that a sale by *Taata* in things of great or little value is established by the mutual consent of the parties.—This is the authentic doctrine in the case of such sales.

If a person commission another to purchase for him two specific slaves without mentioning the price, and the agent purchase *one* of them, it is valid; for in this instance the appointment of agency is valid, and does not restrict the agent to purchase both of the slaves by one contract, which is often impracticable, because of the objection of the proprietor to include them both in one contract.—The agent may therefore lawfully purchase one out of two slaves, unless when he does it by deceit, as his agency authorises him only to make a *just* purchase, which precludes him from making a *deceitful* one.—The doctrine in this case is universally agreed to.

An agent is at liberty, if he chuse, to purchase only one of two slaves specified:

If a person desire another to purchase him two particular slaves, without mentioning the price, and the agent purchase *one* of these slaves, it is valid; because the appointment of the agent, in this instance, is *general*;—(in other words, does not restrict the agency to the purchase of *both* slaves by one contract;) and it seldom happens that *two* slaves are purchased by *one* contract, as a master seldom sells two slaves by one contract. It is lawful for the agent, therefore, to purchase *one* of the two;—(unless, indeed, the purchase be made at an evident *disadvantage*, which would be contrary to the end of the appointment.)

but not if the purchase be at an evident disadvantage:

If

nor if the price exceed the rate expressed in his instructions; unless the difference be trifling.

If a person desire another to purchase for him *two* specific slaves (who are supposed to be of equal value) for one thousand *dirms*, and the agent purchase one of these slaves for five hundred *dirms* or less, it is valid, according to *Haneefa*.—If, however, he should purchase him for *more* than five hundred *dirms*, the contract is not binding on his constituent. The reason of this is that the constituent, having opposed one thousand *dirms* to the two slaves, who are equal in value, did of consequence intend that the agent should pay five hundred *dirms* for each. The agent, therefore, in paying five hundred *dirms*, conforms exactly to the orders of his constituent; and although, in paying less for him, he *does* deviate from his orders, yet this being a laudable deviation, in favour of his employer, is therefore binding. In purchasing him, on the other hand, for *more* than five hundred *dirms*, whether the excess be great or small, he is guilty of a deviation from his orders unfavourable to the interests of his employer, and which is therefore not allowed; unless, indeed, the agent purchase the other slave for the sum remaining to complete the thousand *dirms*, before any litigation happen between him and his constituent, for the former purchase.—What is here advanced proceeds upon a favourable construction of the law. Analogy would suggest that the contract, in this case, ought not to be binding on the constituent, because of the deviation from his orders.—The reason for a more favourable construction, in this particular, is that the purchase of the two slaves for one thousand *dirms* (which is the express object of the constituent) is here obtained; and that the limitation of their prices to five hundred each, in an equal manner, is only an *implied* object, since it requires to be established by reasoning; and an *express* object is always preferred to an *implied* one.—The two disciples maintain that if, in the case in question, the agent should have purchased one of the two slaves for *more* than five hundred *dirms*, by a contract disadvantageous only in a *small* degree, (which cannot always be avoided,) and the money remaining suffice for the purchase of the other slave, it is valid;

valid; because the agency is *absolute*, (that is to say, is not restricted to the payment of five hundred *dirms* for one slave,) although it be restricted to a *just and proper contract*, which that in question may be considered, as the disadvantage attending it is not *great and obvious*.—It is, however, absolutely necessary that the sum remaining suffice to purchase the other slave, in order that the object of the constituent (namely *the purchase of both for one thousand dirms*) be obtained.

If a person desire another, who owes him one thousand *dirms*, to purchase with it a specific slave, and the agent act accordingly, it is lawful; because a specification of the subject of sale amounts to a specification of the *seller*; and as a specification of the *seller* would have been lawful, (for reasons which will hereafter appear,) so, in the same manner, the specification of the *subject* is also lawful.

An agent may liquidate a debt due from him to his constituent, by the purchase of a specific article;

If a person desire another, who is indebted to him one thousand *dirms*, to purchase with it an indefinite slave; and the debtor accordingly purchase a slave, and the slave die before the delivery of him to the constituent; in that case the slave is held to have been the property of the *agent*.—If, on the other hand, he die *after* delivery to the constituent, he is then held to have been the property of the constituent.—This is the doctrine of *Haneefa*.—The two disciples allege that the property of the constituent commences on the instant of the agent obtaining possession of the slave.—A similar disagreement subsists with regard to the case of a creditor appointing his debtor to make a purchase with the debt, either by a contract of *Sillim* or *Sirf*.—The argument of the two disciples is that *dirms* and *deenars*, whether *ready money* or *debt*, are not specific when opposed to any thing in a contract of exchange: (whence it is, that if a person were to sell a specific and existing article, in exchange for a debt, and both parties agree that the purchaser does not owe the seller any thing, yet the contract of sale is not rendered void :) it is therefore the same whether they be specified

but if the article be not specified, and perish, after purchase, in the agent's hands, the debt is not liquidated.

or

or not*; and consequently the contract of the agent is binding on the constituent, because *his* seizure is equivalent to that of his *constituent*.—The argument of *Haneefa* is that *dirms* and *deenars* admit of specification in agency; (whence it is that if a person restrict his agent to the purchase of something with one thousand *specific dirms*, or with a *debt*, and the *specific dirms* be lost in the agent's hands, or the debt become cancelled, the agency is null;) and such being the case, it follows that, in the appointment of an agent for the purchase of a slave, or for making a *Sillim* contract, the property of a debt is vested in a person, by another who is not indebted to him, without his being appointed an agent for the seizure of the said debt, which is unlawful; in the same manner as if a person should purchase a thing in exchange for a debt due to him by some other than the seller; (as if he should say to the seller, "I have bought this thing from you in exchange for a debt owing to me by a certain person, and which you may take for the price;")—in which case the sale would be invalid; and so also in the case in question.—In the appointment of an agent for managing a *Sirf* sale, on the other hand, it would follow that the constituent, *before* possession, commands the use of a thing of which he is not proprietor till *after* possession, (for he is not proprietor of the debt till after the receipt of it;) and the application of the thing in question to a *Sirf* sale, before the seizure of it, is null;—in the same manner as if a person should say "give what you owe me to whomsoever you please."—It is otherwise if the constituent specify the *seller*; because then the seller is his agent for the receipt of the debt, and consequently takes possession of the same in virtue of his agency, and then becomes the proprietor of it himself. It is otherwise, also, where a creditor desires his debtor to bestow the amount of his debt in *charity*, because here the creditor destines his property to God, who

* That is to say, it is the same thing, whether the agent, at the time of purchase, declare that "the *thousand dirms* he pays for the slave are those thousand which he owes to his constituent," or not.

is a known and determinate object.—It is to be observed that as, in all these cases, the agency (according to *Haneefa*) is not valid, the purchase made under it is of force and binding with respect to the agent himself, as being the actual purchaser:—if, therefore, the subject of the sale should decay or be destroyed in his hands, he must sustain the loss: unless, however, the constituent should previously have received seizin of it; because, in that case, it would become his property, as a sale of the slave is in this instance established between the agent and constituent, by a sort of reciprocity.

If a person give another one thousand *dirms*, and desire him to purchase with it a female slave, and the agent accordingly purchase a female slave, and the parties then disagree,—the constituent asserting that he had purchased her for five hundred *dirms*, and the agent declaring that he had paid one thousand for her,—in this case the assertion of the agent is to be credited, provided the value of the slave be estimated at one thousand *dirms*; because the price, according to him, being one thousand *dirms*, in which exact amount he is a trustee, he therefore, in this case, claims a releasement from his charge of trustee; whilst, on the other hand, the constituent claims compensation from him, which he denies.—If, however, the value should be estimated only at five hundred *dirms*, then the assertion of the constituent is to be credited, because the agent departed from his orders in purchasing a female slave for five hundred *dirms*, when the constituent desired one for one thousand *dirms*; and is therefore responsible.—Supposing (on the other hand) the constituent not to have paid the one thousand *dirms* to the agent, and all the other circumstances of the case to remain as above mentioned, then also, if the value of the female slave be only five hundred *dirms*, the assertion of the constituent must be credited, because of the agent's deviation from his orders:—but if the value be one thousand *dirms*, both parties must be required to make oath; (because such is the law in a dispute about the price in a contract of sale; and here the constituent and the agent stand to each

according to the declaration of the agent.

Where an agent and constituent disagree respecting a purchase, a judgment must be given, according to the value;

other in the relation of buyer and seller;—after which the contract of sale (which is supposed to exist between the agent and constituent) is dissolved, and the right of property in the slave becomes vested in the agent.

or according
to the declar-
ation of the
seller.

If a person desire another to purchase for him a specific slave, without mentioning the price, and the agent accordingly purchase the said slave, and they then disagree in regard to the price, (the agent asserting that he had paid one thousand *dinars*, and the constituent asserting that he had only paid five hundred *dinars*,) in this case, provided the seller authenticates the declaration of the agent, his assertion, corroborated by an oath, must be credited.—Some have said that an oath is not to be exacted in this instance, since the doubt arising from the disagreement is removed by the verification of the seller: in opposition to the preceding case, where the seller is supposed to be absent.—Others, again, have said that in this case also an oath is requisite. *Mohammed* alleges that as, after the receipt of the price, the seller is, as it were, a *stranger* to both the agent and the constituent,—and, even *before* the receipt of the price, is in the relation of a stranger to the constituent,—his assertion can have no effect in regard to a disagreement between the constituent and agent; and consequently, that an oath is requisite. This is also the opinion of *Abou Mansoor*; and it is the most authentic doctrine.

SECT. II.

Of the Appointment of AGENTS, by SLAVES, for the Purpose of purchasing their own Persons in their own Behalf.*

If a slave say to a person, "purchase me, in behalf of myself, "from my master, for one thousand *dirms*†," (at the same time delivering the one thousand *dirms*), and the said person accordingly purchase the slave from his master, in behalf of the slave, he [the slave] becomes free; and the right of *Willä* remains with the master; because the sale of the person of the slave to the slave himself is here interpreted in its *metaphorical* sense, (that is, the *liberation* of the slave,) as the interpretation of it in its *literal* sense, (namely, the exchange of property for property,) is here unattainable: the slave's purchase of his own person, moreover, is in fact an agreement on his part to accept his freedom in exchange for his property; and the agent stands merely as a *messenger*, because none of the rights of the contract rest in him:—the case is, therefore, the same as if the slave had purchased his own person: and as the sale of the slave is, in fact, an emancipation of him on the part of the master, he is therefore entitled to the right of *Willä*.—If, however, the agent should not particularly say and explain to the master that he purchased the slave *on behalf of the slave*; but, on the contrary, simply say "I have purchased a particular slave of yours;" in that case the slave becomes the property of the purchaser; because these words, in their literal sense, are used to express an exchange of property for property, which is here practicable, and consequently followed: in opposition to the

A slave may employ a person to purchase his freedom from his master.

* That is, with a view to their emancipation.

† In other words, "purchase my FREEDOM for one thousand *DIRMS*."

former statement of the case, where the *literal* meaning not being practicable, the *metaphorical* sense was therefore adopted:—and as the *literal* meaning (namely, an exchange of property for property) is here followed, the purchaser of consequence becomes the proprietor of the slave; and the one thousand *dirms* given to him by the slave for the purchase of himself are the right of the master, as being the slave's earnings; and the purchaser must pay him another thousand *dirms* for the *price*. In short, in the case of an agent for a slave purchasing the said slave in his own behalf, it is necessary that he particularly explain the circumstances of the case; that is, that he expressly specify the purchase of the slave “*to be made in behalf of the slave,*”—for otherwise the purchase is for *himself*, and *not* for the *slave*. It is otherwise where a person, who is not a slave, purchases, in the capacity of an agent, a specific slave; for it is not necessary that *he* should specify in whose behalf the purchase is made, since the contract of sale takes place, whether such an explanation be made or not; and in either case the seller demands the price from the agent, who is the contracting party. In the case in question, on the contrary, the explanation is material; for if it be *not* made, the transaction is a *sale*;—or, if it *be* made, it is an *emancipation*, with a reversion of the right of *Willa*; in which case the price is not demanded from the agent, notwithstanding he is the contracting party:—it is, moreover, possible that the master may not be inclined to the emancipation, but may assent to the sale merely with a view to the *exchange*,—in which case, also, explanation is indispensable.

A slave may act as the agent of another person, in purchasing his own freedom.

If a person say to a slave “purchase your own person on my behalf from your master;” and the slave say to his master “sell me, on account of a particular person, for this quantity of *dirms*,” and the master accordingly agree, in this case the slave becomes the property of the constituent; because a slave is capable of becoming an agent for the purchase of himself, since, with regard to the property involved in his person, he himself is as a stranger; and as he is *property*, a contract

a contract of sale operates with respect to him, although the seller (because of the property being in the hands of the slave himself) be not entitled to detain him from the constituent after the sale, as a satisfaction for the price:—and as the slave is capable of agency, it follows that if, in the case in question, he refer the contract to his constituent, it consequently holds good with regard to the constituent, because of its being in conformity to his orders; but if, instead of referring it to his constituent, he should refer it to *himself*, he then becomes *free*, because the contract is in that case an *emancipation*, to which the master agrees.

OBJECTION.—The slave is, in this case, an agent for the purchase of a specific thing; but an agent for the purchase of a specific thing is not entitled to purchase that thing for *himself*.

REPLY.—Although the slave, in this case, be an agent for the purchase of a specific thing, yet, by purchasing, he in reality performs an act of a different nature from *purchase**, and that act is therefore allowed to be expedited in his behalf.

—If, also, the slave simply say to his master, “sell me,” without mentioning the particular person, he is free; because his speech being *absolute*, and admitting of two interpretations, is not applied in favour of the *constituent*, on account of the doubt which exists, and which consequently determines the transaction to be a contract *in behalf of himself*.

SECT. III.

Of AGENCY for SALE

An agent for purchase or sale is not permitted, according to *Hanefah*, to enter into a contract of purchase or sale with a person whose

An agent for sale cannot sell to his

* Namely, emancipation.

father or
grandfather.

evidence would not be admitted in his [the agent's] behalf, such as his father or grandfather.—The two disciples allege that if an agent should sell a thing to any person whatever, standing in that relation to him, (except his *slave* or his *Mokâtib*,) for an equivalent to the value of the subject of the sale, it is lawful; because agency is absolute; and an agent is not liable to suspicion from such a sale, since the property of those relations is distinct and separate from his property; and neither party is entitled to derive a benefit from the property of the other. It is otherwise where an agent sells a thing to his own slave, because that, in fact, is a sale to *himself*, as the possessions of a slave are the property of his master; and the right of a master extends to the earnings of his *Mokâtib*, and becomes, in reality, *his* property in the event of the *Mokâtib*'s inability to discharge his ransom.—The arguments of *Haneefa* upon this point are twofold.—FIRST, any transaction which begets suspicion must be excepted from agency;—and the act of sale on the part of the agent, to persons under the above description, does beget suspicion, since they are excluded from giving evidence in his behalf.—SECONDLY, a mutual right of usufruct and advantage subsists between the agent and such relations*, since each is entitled to derive an advantage from the property of the other; the sale of any thing to *them*, therefore, is in a manner a sale to *himself*.—A similar disagreement subsists with respect to a contract of *Sirf* or of *hire*, under these circumstances.

He may sell
the article
committed to
him at what-
ever rate, and
in return for
whatever
commodity,
he thinks fit.

WHOEVER is appointed an agent for the sale of any thing, may lawfully (according to *Haneefa*) sell that thing, either for a large or small price, or in exchange for any thing else, as well as for *money*.—The two disciples maintain that it is neither lawful to sell the thing at a great and obvious disadvantage, nor for any thing but *money*, for the following reasons.—FIRST, agency, although absolute, is yet restricted to the common customs of mankind; because, as all transactions

* Namely, his father and grandfather. (See *Imbîsât*.)

(such

(such as purchase and sale, for instance) are for the purpose of removing or remedying a want, they are therefore restricted to the measure of that want;—(whence it is that agency for the purchase of a *stove*, or of *ice*, or of any animal destined for *sacrifice*, is restricted to the period in which those things are wanted;—) and the common practice among mankind is to sell a thing for an adequate value, and for this value (not in any thing else, but) in *money*.—SECONDLY, sale at a *great and evident disadvantage* is partly a *sale* and partly a *gift*;—in the same manner, also, the sale of goods for other goods (which is termed *Beca Mokása*, or barter) is *sale* in one shape, and *purchase* in another shape;—neither of these, therefore, can be absolutely termed a *sale*.—The argument of *Haneefa* is that agency is *absolute*, and must therefore be permitted to operate in an absolute manner, provided it be not subject to suspicion.—The sale, moreover, of a thing at an evident disadvantage is a common practice when there is pressing occasion for the price; and, in the same manner, it is also common to sell goods in exchange for goods, when one of the proprietors loses all desire for his own goods.—With respect to the example of the sale of a *stove*, or of *ice*, or of an animal destined for *sacrifice*, (as adduced by the two disciples in support of their opinion,) the doctrine regarding them cannot be admitted, according to the tenets of *Haneefa*, since the *contrary* is related as an opinion of his upon those subjects.—Besides, sale at an evident disadvantage is, nevertheless, wholly a *sale*, and in no respect a *gift*; whence it is that if a person were to make a vow, saying “by God I will not sell such a thing,” and afterwards dispose of it to an evident loss, he is forsworn.

OBJECTION.—If sale at an evident disadvantage be still wholly a *sale*, it follows that a father or executor may sell the goods of a minor at a disadvantage.—How, therefore, does it happen that they are both debarred from doing this?

REPLY.—The reason is that their power is founded entirely upon their supposed regard for the interest of the minor; and the transaction

in

in question being of a nature which argues a want of this regard, is consequently not permitted to them.

—In regard to a sale of goods for goods, it is either completely a sale, or completely a purchase; and cannot be *partly* a sale, and *partly* a purchase, since the properties of sale exist completely in it, as well as the properties of a purchase.

An agent may purchase a thing at any rate not greatly exceeding the value.

—AN agent for purchase may lawfully buy a thing for a price equivalent to its value: and also for more than its value, provided the difference be not *very considerable*; but it is not lawful for him to purchase it at a rate *much beyond* the value, as this gives room for suspicion, since it is possible that he may have first purchased it for himself; and that afterwards, on perceiving the loss, he had determined it for his constituent. If, however, an agent be employed for the purchase of a *specific* thing, and purchase it for a price much beyond its value, lawyers have observed that the bargain is nevertheless made for his constituent; since an agent for the purchase of a *specific* thing, as not being allowed to purchase that thing for *himself*, is not, of consequence, liable to any suspicion.—In the same manner, also, if an agent for marriage should contract a woman in marriage to his constituent, engaging for a dower beyond her *Mibr Misl*, or *proper* dower, it is lawful, according to *Haneefa*; because, in marriage, as the agent must necessarily refer the contract to his constituent, he is, therefore, not liable to suspicion:—but it is otherwise with an agent for *purchase*, as he may, if he please, settle the contract in an *absolute* manner without referring it to his constituent.—The term *evident disadvantage*, as here used, signifies a rate beyond the valuation of appraisers,—as where, for instance, if several persons make an appraisement of a thing, none of their appraisements equal the price given.—Some have said that this term is used in the exchange of goods for goods, where the difference is as *ten to ten and an half*; and in cattle, where it is as *ten to eleven*; and in immoveable property, where it is as *ten to twelve*.

The

The reason of these proportions is that the sale of the *first* kind is common; of the *second* kind the sale is in a mean between frequency and rarity; and of the *third*, it is rare:—and the disadvantage increases in proportion to the rarity of the transaction.

If a person, being appointed an agent for the sale of a slave, should sell the *half* of him, such sale is valid, according to *Haneefa*; because the agency is in this instance absolute, and does not restrict the sale either to *one* or *more* contracts; and as it would have been valid, under such circumstances, if he had sold him *wholly* for *half* of the price, it follows that it is valid where he sells the *half* for half of the price, *a fortiori*.—The two disciples allege that the sale of the *half* of the slave is not valid, as not being agreeable to custom, and because it involves the vexation of participation in the property:—the sale, therefore, is invalid; unless the sale of the remainder also be completed previous to the disagreement of the parties, and their appeal to the *Kâzee*,—in which case it is valid, since the sale of one half may be necessary to facilitate the sale of the other half;—(as where, for instance, there is no purchaser for the *whole*, when it would be incumbent on the agent to make partial sales:)—if, therefore, he sell the remaining half prior to the delivery of the subject of the first sale, it is evident that the sale of the *first* half was made with a view to facilitate the sale of the *whole*, and is consequently valid: but if, on the contrary, he should *not* sell the remaining half, it is evident that the *partial* sale was not adopted as a mean of facilitating the sale of the *whole*, and is consequently invalid.—This distinction, according to the two disciples, proceeds upon a favourable construction of the law.

An agent for the sale of a slave may lawfully sell any part or portion of him.

If a person be appointed an agent for the purchase of a slave, and purchase *one half* of him, the purchase remains suspended; (that is to say, it is binding on the constituent in case the agent afterwards purchase the *other* half;) because the purchase of a *part* may be the means of the purchase of the *whole*; (as where the slave, for instance,

An agent for the purchase of a slave may purchase him either *wholly* or in *parts*.

has become the property of a *number* of persons, by inheritance, in which case there is a necessity for the agent purchasing *one* share from *one* heir, *another* from *another*, and so forth;)—and where the agent purchases the remainder of the slave before his constituent rejects the *first* purchase, it is evident that he purchased *part* merely with a view to facilitate the purchase of the *whole*:—the contract of purchase is therefore binding upon the constituent, and effectual with respect to him.—This is universally admitted.—According to *Haneefa*, there is a difference between this and the preceding example; for two reasons. **FIRST**, in the *purchase* of a half of the slave there exists a suspicion, as it is possible that the agent may have made the purchase in his own behalf, and becoming afterwards sensible of the defect arising from participated property, may have then determined it for his employer: a suspicion which does not exist in the case of the *sale* of the half:—**SECONDLY**, the order of a constituent to *sell* any thing is an order relative to his own property, and is consequently valid; and such being the case, restriction or latitude must be attended to.—The order of a constituent to *purchase* any thing, on the contrary, is an order relative to the property of *another*, and is consequently invalid; and such being the case, restriction or latitude are not objects of attention.

An agent to whom an article of sale is returned, by a decree of the *Kâzee*, in consequence of an *original* defect, may return it to his constituent, who must receive it back without any suit.

If a person desire another to sell his slave, and the other sell the slave accordingly, and either take possession of the price or not, and the purchaser, in consequence of a defect of such a nature as could not have been supervenient, (such, for instance, as an *additional finger*,) return him upon the agent's hands, by a decree of the *Kâzee*, founded either upon evidence, or on the refusal of the agent to take an oath, or on his express acknowledgment,—in this case the agent may return him to the constituent; because the *Kâzee*, in this instance, has expressly determined the defect to have had existence during the possession of the seller, on which account he decrees the return; and hence his decree is not, in fact, founded on any of the above circumstances,

stances, namely, *evidence, refusal to take an oath, or acknowledgment.*

OBJECTION.—What occasion, therefore, for the exhibition of these proofs? and why is any mention made of them in this case?

REPLY.—To remove the doubt thus stated, the author of this work observes, that the *Kâzee* knows with certainty that a defect, such as above described, could not happen in the course of a month; but not knowing when the sale took place, there is therefore a necessity for these proofs, in order to ascertain the date of the sale, and that the *Kâzee* may be enabled clearly to determine that the said defect had not happened *since* the sale, but had existed *prior* to it.—The defect may also be of such a nature as required the inspection of women or physicians:—but although the opinion of women or physicians be sufficient to prevent contention, yet it is not a sufficient ground for a decree of restitution: there is, therefore, a necessity for the proofs aforesaid;—unless, indeed, the *Kâzee* himself witness the sale and perceive the defect, in which case there is no necessity whatever for those proofs.—The return to the agent is, in fact, a return to the *constituent*; and hence the agent is under no necessity of entering a suit against his constituent to enforce his admission of the return.

THE law is similar where the purchaser returns the slave to the agent, in virtue of a decree of the *Kâzee*, founded either on evidence or refusal to take an oath, on account of a defect of such a nature as may have taken place *subsequent* to the sale; because *evidence* is absolute proof: and, as to the *agent*, he is under a necessity of declining to swear, as he had not always the possession of the slave, having received him only after the appointment of agency, whence it is possible that he is unacquainted with the defect;—when, therefore, the purchaser returns the slave on account of the agent's refusal to take an oath, the sale affects the constituent, and he must take him back.—If, on the other hand, the purchaser return him to the agent, in con-

And so also, where the defect is *super-venient*; provided the *Kâzee's* decree be not founded on the agent's *acknowledgment*;

in which case
the constitu-
ent is not ob-
liged to re-
ceive it back
without a suit.

sequence of a decree founded on his *acknowledgment*, the sale is abso-
lute upon the agent, as acknowledgment is a *weak proof*, (that is,
does not effect any other than the acknowledger;) and the agent does
not act from necessity, in this case, as he had it in his power either to
have remained silent, or to have refused taking an oath.—The agent,
however, may afterwards litigate the matter with his constituent, and
oblige him to take back the slave on his establishing proof by evidence,
or on the constituent's refusal to take an oath.—It is otherwise where
the purchaser returns the slave to the agent, on his acknowledgment,
without a decree, for in this case he has no grounds for a suit
against the constituent to compel him to retake the slave; because this
return is a sale *de novo* with respect to a *third* person, who is neither
the *purchaser* nor *seller*; and the *constituent* must be this third person,
since none but the agent can be considered as the *seller*.—The agent,
therefore, in receiving back the slave from the purchaser to whom he
had sold him, does, as it were, *repurchase* him; and hence he is de-
barred from returning him to the constituent, or litigating the matter
with him.—A return of the subject of the sale, on the other hand, *in*
virtue of a decree of the KâZEE founded on an acknowledgment of the
seller, is an *annulment of the contract of sale*, and not a sale *de novo*;
because although the authority of the *Kâzee* be *general*, yet acknow-
ledgment is but *weak proof*.—In this case, therefore, as the contract of
sale is annulled, the agent is entitled to sue the constituent, in order
to compel him to receive back the slave: but as his acknowledgment
is insufficient proof, the constituent cannot be compelled to receive
back the slave without proof by evidence*.

If the defect
be *original*,
the constitu-
ent must re-
ceive back
the article

IF, on the other hand, the defect on account of which the pur-
chaser has returned the slave be of such a nature as cannot be *superve-*
nient, (such as a *superfluous finger*, for instance,) and the return be
made to the agent in consequence of his acknowledgment of the de-

* Meaning, *proof to the existence of the defect*.

fect, without any decree of the *Kāzee*,—in this case, according to one tradition, the constituent is obliged, without the necessity of establishing a suit against him, to receive back the slave; as the return is of a determinate nature, and therefore the parties did of themselves what the *Kāzee* would have done.—According to many traditions, however, the agent has here no right to sue the constituent, in order to make him receive back the slave, for the reason already stated, that “the purchaser’s returning the article to the agent, in consequence of his acknowledgment, is a sale *de novo*, with respect to others than the parties themselves; and the constituent is not a party.”—In regard to the assertion contained in the first tradition, that “the return of the subject of the sale was a thing of a determinate nature,” it is not admitted; because the right of the purchaser, at first, was that the subject of the sale should be in a complete and perfect state; and failing of this, his right then relates to a return of the subject; and afterwards it shifts, and relates to a restitution of the exact quantity of loss he may have sustained in the price.—In this case, therefore, the return of the subject of the sale is not a thing of a determinate nature.

from his agent without litigation, whether it be returned by the purchaser in consequence of his [the agent’s] acknowledgment, or not.

If the constituent and agent disagree, the one asserting that “he had ordered the other to sell his slave in exchange for ready money, and that he had nevertheless sold him on credit,”—and the other, that “he [the constituent] had merely desired him to sell him, and that he had said nothing more,”—in this case the assertion of the constituent must be credited; because he is the person from whom the order issued; and no argument exists of this order being *absolut*, agency being in its original nature *relative* and *restricted*; whence it is that if one person should say to another, “I have made you agent with regard to my property;” the agent would not be permitted to do as he pleased with regard to the property, but would be restricted entirely to the preservation of it.—If, on the other hand, a disagreement similar to that

A constituent must be credited with respect to his instructions.

that in question should take place between a *manager** and his *principal*, the assertion of the *manager* must be credited; because *Mozáribat* is in its original nature *general* and *absolute*; whence it is that if a person should say to another "I have delivered this property to you by way of *Mozáribat*," or, "take this property by way of *Mozáribat*," the other might lawfully perform acts of *Mozáribat* with that property†.—In *Mozáribat*, therefore, an argument exists of its being *absolute*. It would be otherwise, indeed, if the principal should declare that he had given the property to be used by *one particular mode* of *Mozáribat*, and the manager should declare that he had stipulated *another* mode: for, in such a case, the assertion of the principal would be credited; because the parties are both agreed, in this instance, that the *Mozáribat* was *restricted* and not *absolute*; and *Mozáribat*, whenever it ceases to be *absolute* and is determined to be *restricted*, resolves itself into a mere *agency*.—It is to be observed that an unrestricted commission to sell any thing may relate either to *ready money*,—or to *credit*, whether for a *long* or a *short* period, according to *Haneefa*. The two disciples maintain that the period of credit must be confined to what is *customary*.—The principle on which this proceeds has been already explained.

An agent for sale is not responsible for consequences.

If a person order another to sell his slave, and the other, having accordingly sold him, should take a pledge for the price, which pledge is afterwards lost or destroyed in his possession,—or, if he should take security from the purchaser for the payment of the price, and both the surety and the purchaser die insolvent, or disappear, so as to leave it unknown whither they are gone—in neither of these cases is the agent responsible: for *he* is the original with respect to the rights of the con-

* Arab. *Mazárib*.—Meaning, an agent for trade. It is particularly treated of under the head of *Mozáribat*.

† That is to say, might employ it in trade according to his own discretion.

tract of sale; and seizin of the price is one of these rights;—and as the taking of security was with a view to add to his certainty, and the taking of a pledge was in the nature of a bond to answer the payment of the price, it follows that he was competent to these acts.—It is otherwise with respect to an agent for the receipt of *debt*; for he acts by way of *substitution*; that is to say, the creditor has substituted him to receive the debt for him, but has not appointed him to take security or a pledge in opposition to the debt; whereas an *agent for purchase*, on the contrary, receives the price in virtue of his being a principal, and a party in the contract, and therefore the constituent cannot prevent him from performing these acts.

SECT. IV.

MISCELLANEOUS CASES.

If a person appoint *two* agents, it is not permitted to either of them to act in any matter relative to their agency, without the concurrence of the other.—This is the law with respect to all transactions which require thought and judgment, (such as *sale*, *Khoola*, and so forth,) because the constituent, in those transactions, may have a confidence in the joint judgment of *both* the persons in question, although not in the single judgment of either of them.

Joint agents cannot act separately without a mutual concurrence;

OBJECTION.—Where the price is fixed, there can be no need for thought and judgment; and therefore, in that case, the act of one of the parties ought to be valid: whereas it is held to be otherwise.

REPLY.—Although the price be fixed, yet there may be occasion for judgment to increase it, and also to make a proper choice of a purchaser.

except in the
management
of a suit,

gratuitous
divorce or
manumission,
the restora-
tion of a de-
posit, or the
discharge of
a debt.

THE act of one of two agents without the concurrence of the other is not valid excepting in some particular cases:—as where, for instance, a person appoints two agents for the management of his suit, in which case either of these may lawfully act without the other; because their *joint* action is impracticable, as it would only create a noise and confusion in the assembly of the *Kāzee*. Their judgment, moreover, is required to be exerted *previous* to the assembly of the *Kāzee*: in other words, they ought previously to consult with each other, and then one of them ought to attend the meeting of the *Kāzee* to manage the replies and interrogations; which may be more effectually executed by *one* than *two*, since, in the latter case, much noise and confusion would ensue.—In the same manner it is lawful for one of two agents to act singly in case of their having been jointly appointed agents by another to execute a *divorce* in his behalf without a compensation*;—or to emancipate his slave without a consideration;—or to restore a deposit to the owner of it;—or, lastly, to discharge a debt due by him. The reason of this is, that in these cases there is no necessity for consultation and judgment, since in all of them *explanation* merely is required; and the speech of *one* man, in this respect, is equal to that of *two*.—It were otherwise if the constituent had said to the two agents, “divorce a particular wife of mine *if you please*,” or “the business of such a wife is in your hands,”—for in this case it would not be permitted to one of the two agents to divorce the said wife; because the constituent has committed the divorce to the thought and judgment of *both*; and also, because he has suspended it upon a circumstance relative to both,—namely, their *pleasure*,—and as he has connected it with a circumstance relative to *both*, it becomes analogous to where a person connects the divorce with the arrival of two persons at a particular house; in which case the execution of it rests on the arrival of *both* these persons at the said house; and so also, in the case in question, it depends on the joint wish of both the agents.

* In opposition to *Khoola*, or divorce for a compensation.

AN agent is not permitted to appoint another person an agent to execute a commission to which he himself was appointed, as the constituent, in committing the transaction to him, did not empower him to appoint an agent for the execution of it.—The reason of this is that although the constituent be satisfied with the judgment of his own agent, yet it does not follow that he is satisfied with the judgment of *another* person, since mankind in this respect are different.—It is, therefore, not lawful for an agent to appoint an agent, unless with the consent of his constituent; or unless the constituent should have desired the agent to act according to his wisdom and judgment,—in the first of which cases the consent is express; and in the second, the constituent commits his business, in an absolute manner, to the agent's discretion.—As, in this case, however, the agency of the secondary agent is valid, he is the agent of the primary constituent; and hence the primary agent has not the power of dismissing him, nor would his power of agency cease in case of the *death* of the primary agent. The agencies of both, however, would terminate in the event of the death of the constituent. A case which exemplifies this has been already set forth in treating of the *duties of the KâZEE*.

An agent cannot appoint a *secondary* agent;

unless by consent of his constituent; or, unless his powers be discretionary.

IF an agent appoint an agent without the consent of his constituent, and the secondary agent conclude a contract of sale in the presence of the primary agent, the contract is in that case valid, because it has had the advantage of the wisdom and judgment of the primary agent, which is the very object of the constituent.—A disagreement, however, subsists with respect to the *rights* of this contract.—Some have said that they appertain to the *primary* agent, as the constituent has not acquiesced in any other's undertaking the fulfilment of the contract; whilst others maintain that they relate to the *secondary* agent, as being the actual framer of the contract. If, on the other hand, the secondary agent conclude a contract in the *absence* of the primary agent, it is not valid, as it has not the advantage of the wisdom and judgment of the primary agent.—If, however,

Contracts entered into by a *secondary* agent in the presence of the *primary* are, however, valid:

and they are also valid,

although made in his absence, provided he afterwards consent to them,

—(and the same of a contract engaged in by any stranger;)

or that (in a case of purchase or sale) the constituent had previously fixed the rate.

Joint agents must act together, although the constituent have fixed the rate.

the primary agent, having received information of the contract, should express his acquiescence in it, it is then valid: and so also, a contract becomes valid which, having been concluded by some other than the agent, afterwards receives his assent on his hearing of it, since it has thus the benefit of his judgment.—If, also, the primary agent first fix a price to be observed by the secondary agent, and the secondary agent then enter into a contract of purchase or sale, such contract is valid; because the exertion of the primary agent's judgment is evidently required only for the purpose of *fixing the price*, which has been already done.—It is otherwise, however, where the constituent appoints *two* agents, and fixes the price himself: for, in this case, notwithstanding the constituent's settlement of the price, the conclusion of the contract by one agent, although at the fixed price, would not be valid; because where the constituent appoints two agents, notwithstanding his having fixed the price, it is evident that his object is a union of the judgments of *both*, in order either to increase the *quantity* of the goods (if they be agents for *purchase*,) or to make a proper choice of *purchasers*, (in case they be agents for *sale*,) as was before stated: whereas, if the constituent should *not* fix the price himself, but resign the management of the contract to *one* person, (being his immediate agent, and not the agent of his agent,) in that case his object is to obtain the judgment of the agent in the grand point of the contract, namely, the *amount of the price*.

A *Mokâtib*, a slave, or a *Zimnee* cannot act on behalf of an infant daughter being a *Muslima*:

If a *Mokâtib*, an absolute slave, or a *Zimnee*, contract a marriage in behalf of a minor daughter who is free and a *Muslima*,—or make a purchase or sale in behalf of a minor child under such description,—it is unlawful; (and the same of every other transaction which they perform relative to the *property* of such a child;) as a slave or an infidel are not endowed with authority, because of their slavery and infidelity; for as a slave has not the power to marry in *his own* behalf, it is evident that he cannot have that power with respect to others; and an infidel, on the other hand, has no power over *Muslimans*; inasmuch that

that his evidence with respect to them is not admitted.—Besides, the power in these cases, (that is, the right of acting with regard to the property of an infant,) is granted with a view to the infant's advantage, and out of regard to his interest; and hence it is necessary that this power be consigned to a person competent and affectionate, in order that the end may be answered: now *competency* is destroyed by *slavery*; and the existence of affection to a *Mussulman* is incompatible with *infidelity*: a right of action, therefore, with regard to the property of the infant in question, cannot be committed to a *slave* or an *infidel*.—*Haneefa*, *Aboo Yoosaf*, and *Mohammed*, are of opinion that an apostate who suffers death on account of his apostacy, and an infidel *alien*, are, with respect to an infant daughter who is a *Mussulma*, in the same predicament with a *Zimmee*;—(that is to say, neither of these has a right to perform any act with regard to her property, such as purchase or sale, or the contracting of her in marriage with another;)—because an infidel *alien* is endowed with *still less* power over a *Mussulman* than a *Zimmee*: and with respect to an apostate, although (in the opinion of the two disciples) he possesses power with regard to his *own* property, yet his power over his children, or over their property, remains suspended upon his repentance and return to the faith, according to *all* our doctors; because a power of action, with respect to the property of an infant, is founded on the infant's advantage, and a regard for his interest; and an apostate's regard for the interest of his child (being a *Mussulman*) must entirely depend on his return to the faith; now this is a circumstance of doubt: if he be put to death in his apostacy, it is then evident that he has no power of action, and all such acts are consequently null:—if, on the other hand, he return to the faith, it becomes the same as if he had been always a *Mussulman*, and his acts of the nature in question are therefore valid.

and the same
of an apostate,
or infidel alien.

C H A P. III.

Of the Appointment of Agents for *Litigation* and for *Seizin*.—(*Khasoomat*, or *Litigation*, means a Conversation carried on between two Persons in the way of *Contention* and *Disagreement*.)

Agency for *litigation* implies and involves an agency for *seizin*:

(but decrees are passed on the contrary principle in the present times.)

If a person appoint another his agent to contend for something in his behalf, the person so appointed is held, in the opinion of all our doctors, to be also an agent for the *seizin* of that thing, whether it be *debt* or *substance*.—*Ziffer* alleges that he cannot be considered as an agent for *seizin*, since his constituent acquiesces only in his agency for *litigation* in his behalf.—*Litigation*, moreover, is one concern, and *seizin* is another concern; and the constituent expresses his acquiescence in the *litigation*, but not in the *seizin*. The argument of our doctors is that when a person becomes empowered with respect to any thing, he necessarily becomes empowered with respect to the *completion* of that thing; and the end and completion of a *contention* for any thing is the *seizin* of that thing.—In the present age decrees pass according to the opinion of *Ziffer*; because of the apparent want of probity of agents in this age; and also, because many men may be trust-worthy in regard to the management of a contention, and not with respect to the *seizin* of property.—It is to be observed that an agent for *litigation* is analogous to an agent for exacting the payment of a debt; because he also is competent to the *seizin*, in as much as the *seizin* of a debt is in effect included in the suing for the payment of it. The common acceptance of the word, however, is different, because from *Takáza* [exact-ing by means of a suit at law] *seizin* is not generally understood; and the

the common acceptation must be preferred to the *virtual* meaning.—According to the decrees in this age, therefore, he is not an agent for *seizin*.

If there be *two* agents for litigation, they are in that case required jointly to receive *seizin* of the thing which is the object of contention; because the constituent has expressed his acquiescence in the probity of them both *jointly*, and not in that of *either* of them *singly*; and as the conjunction of both, with respect to *seizin*, is practicable, they must therefore take possession together.—It is otherwise with respect to the mere *litigation*, because their joint action is in that particular impracticable, as has been already demonstrated.

WHOEVER is an agent in behalf of another for the *seizin* of a debt due to him, is also an agent for *litigation* in behalf of that person, according to *Haneefa*; (whence it is that if the other party bring evidence to prove that the constituent had received payment of his debt, or had given the creditor an acquittal, such evidence, in the opinion of *Haneefa*, would be admitted.)—The two disciples maintain that the agent in question is not an agent for *litigation*; (and such also is reported, by *Hasan*, from *Haneefa*;) because *seizin* and *litigation* are different things; and it does not follow that a person, from being trustworthy with regard to property, should also be skilled in the business of litigation. The acquiescence of the constituent, therefore, in the agency for *seizin*, does not necessarily involve his acquiescence in the agency for *litigation*.—The argument of *Haneefa* is that an agent for the *seizin* of a debt is an agent for the substantiation of property; (that is, he is an agent for the receipt of a consideration for a debt which is the right of the creditor, in order that such consideration may become the property of the creditor; because it is impossible to receive the *actual substance* of the debt; and hence whatever he receives in the discharge of the debt becomes the property of the creditor; and as this is a *compensation*, or *contract of exchange*, the agent

An agent empowered to take possession of a debt is also an agent for *litigation*.

is consequently the *principal*, he being so with respect to all such rights as a contract of exchange require;)—and such being the case, he is of course the plaintiff, and is entitled to carry on the suit in the same manner as an agent for litigating a right of pre-emption, or for *purchase*. He most resembles, however, an agent for litigating a right of pre-emption; because an agent for the receipt of a debt, institutes his suit prior to the seizure of it, in the same manner as an agent for maintaining a right of pre-emption institutes his suit prior to his taking the right; whereas an agent for purchase cannot institute a suit, until he has completed the contract of purchase.

A commission to take possession of substance does not involve a commission to litigate.

AN agent for the seizure of substance* is not an agent for litigation, according to all our doctors; because he is a mere *trustee*; and also, because the seizure of substance is not an exchange: he is, therefore, considered merely as a *messenger*.—Hence, if a person commission another to take possession of his slave, and the person in whose possession the slave is should prove by witnesses that the constituent had sold the slave to him, the *Kâzee* must not decree the sale against the agent, until the constituent himself appear.—This proceeds upon a favourable construction.—Analogy would suggest that the slave should be delivered to the agent, because, as the proof has been exhibited against a person who is not the adversary, (since the *agent* is not the adversary,) it cannot therefore be admitted. The reason for a more favourable construction, in this particular, is that the evidence goes to two points;—FIRST, to prove the sale on the part of the constituent, and the consequent destruction of his property;—SECONDLY, to prove that the said agent has no right to make seizure of the said slave.—Now, although the evidence on the *first* point be not against a regular adversary, yet in regard to the *second* point it is against a regular ad-

* Arab. *Ain*;—meaning some *actually existent* property, (such, for instance, as an article borrowed under an *arreat* loan,) in opposition to a debt in *money*, or to an article compensable by an equal quantity of the same article (such as *grain*, and the like.)

versary; (for the *agent* is the adversary on the *second* point:)—the evidence, therefore, is admitted with respect to the *second* point, but not with respect to the *first* point; whence, if the constituent were himself to appear, it would be necessary to exhibit the evidence *de novo*, to prove that he had sold the slave.—It is therefore the same as if evidence had been adduced to prove that the constituent had *dismissed* his agent, for that would be admitted so far as to prevent the agent from the seizure; and so also in the case in question.—The effect is the same in cases of *emancipation*, *divorce*, and the like.—Thus, if a person commission another to bring his wife from her present place of residence,—or to bring his male or female slave,—and the agent having arrived at the place of their residence, the wife should prove, by witnesses, that her husband had divorced her,—or the slave prove, by witnesses, that he or she had been emancipated,—such evidence must be admitted, so far as to prevent the agent from carrying them away until the constituent shall himself appear,—but not with respect to the *divorce*, or the *emancipation*.

If an agent for litigation make an acknowledgment, before the *Kāzee*, of something affecting his constituent, such acknowledgment is valid with respect to the constituent. If, however, he should make the acknowledgment before any *other* than the *Kāzee*, it is not valid, (according to *Haneefa* and *Mohammed*, arguing on a favourable construction of the law;)—but the agent, in consequence of making such acknowledgment before another than the *Kāzee*, is dismissed from his appointment; and therefore, if he should afterwards claim his agency, and bring witnesses to prove his acknowledgment, it would not be admitted.—*Abou Yoosaf* alleges that an acknowledgment made before any other than the *Kāzee* is likewise valid with regard to the constituent. What is here said proceeds upon a favourable construction.—*Ziffer* and *Shafet* maintain that the acknowledgment is not in either case valid with respect to the constituent: and this (which was the first opinion of *Abou Yoosaf* on the subject) is conformable to analogy; because the agent

An agent for litigation is empowered to make *concessions* on behalf of his constituent.

agent was directed to *litigate*; and by *litigation* is understood *contention*, since this is an essential property of litigation: now *acknowledgment* is the *reverse* of *contention*; and a direction to perform any act cannot extend to the *reverse* of that act: on which principle it is that (as contention is necessary to the existence of *litigation*) an agent for litigation is not competent to the acts of composition or exemption*;—and also, that a commission of agency is valid, where the agent's acknowledgment is expressly excepted from it, for if acknowledgment be comprehended under litigation, the exception of it would be invalid, in the same manner as the exception of the *denial* of the agent†.—A similar disagreement also subsists with respect to the case of a person appointing another his agent to give, in an absolute manner, an answer in his behalf: for this kind of agency is restricted to an answer that relates to litigation; because such is the common practice; and hence an agent to give an answer in an *absolute* manner is, in fact, an agent for *contention*.—The reason for a more favourable construction of the law, in this particular, is that agency for litigation is indisputably valid; and the validity of it extends to every point in which the constituent is competent. Now the constituent is in an absolute manner competent with respect to an answer, whether it relate to *denial* or *acknowledgment*; for his power is not confined and determined to *one* of these only. The agent, therefore, is also competent to either of these. Simple *litigation*‡, moreover, figuratively signifies *general reply*; and as there is always an affinity between the *figurative* and the *literal* sense of a term, (as will be hereafter demonstrated,) the term must, in the present instance, be received in its figurative sense, so as to render the agency indisputably valid: for

* In other words, of agreeing to a composition, or giving a discharge, for a debt.

† “In the same manner as the exception of the denial of the agent:”—that is, in the same manner as if the agent's power of *denying* and *rejoining*, &c. were expressly excepted from his commission.

‡ Arab. *Khasomat*.—The reasoning in this passage turns entirely upon the primitive sense and generally accepted meaning of the term.

if the term be adopted in its *literal* sense, (namely, *contention*;) it would follow that the appointment is a commission to *quarrel* and *contend*; and *quarrelling* and *contention* are prohibited; and the appointment of an agent with respect to a *prohibited* thing is forbidden. It is therefore indispensable that the term be taken in its *figurative* sense, (so as to render the agency valid,) as this is most becoming the *Mussulman* character.

If a person appoint an agent for litigation, and except his acknowledgment, it is recorded from *Aboo Yoosaf* that the appointment is invalid, since after the exception of the acknowledgment there remains only the *denial*; and as the *constituent* is not empowered with respect to *denial* only, except where he knows the claim of the adversary to be unjust, he cannot limit the power of the agent to *denial* only.—It is recorded from *Mohammed*, (on the other hand,) that this is valid; for the exception of acknowledgment by the constituent clearly indicates that he himself is empowered only with respect to *denial*, because of his knowing the falsity of his adversary's plea.—If, however, he should have expressed himself generally, the commission must be interpreted to convey a power of *general reply*, which is becoming the condition of *Mussulmans*.—It is also related of *Mohammed*, that he made a distinction between the plaintiff and defendant, observing that if a *defendant* should appoint an agent for litigation, and should except his acknowledgment, it is invalid; because a defendant is compelled to make an acknowledgment when put to his oath, and therefore has not the power to establish agency for a purpose prejudicial to the plaintiff, that is, for *denial*, as to this he himself is not competent.—The plaintiff, on the contrary, is at liberty either to acknowledge or deny, as he pleases; and hence he is entitled to appoint an agent for one of these purposes, and to except the other.—*Aboo Yoosaf* argues that an agent is the substitute of his constituent; and as the acknowledgment of a constituent is not limited to the court of the *Kâzee*, so neither ought that of his *substitute* to be so limited.—*Haneefa*

Case of an appointment of agency with an exception of acknowledgment.

neefa and *Mohammed*, on the other hand, argue that agency for litigation extends to a reply, which is termed *litigation* either in its *literal* or *metaphorical* sense.—Now an acknowledgment in the assembly of the *Kāzee* is metaphorically termed *litigation*, either because it is opposed to the litigation that has issued, or because the litigation is the cause of the acknowledgment; the acknowledgment, therefore, is limited to the assembly of the *Kāzee*.—If, on the other hand, it be proved, by evidence, that such an agent had made an acknowledgment *elsewhere* than in the assembly of the *Kāzee*, his agency determines: and consequently if he should make a claim with respect to the point concerning which he had before made acknowledgment, and should adduce evidence to prove it, his claim would not be admitted, nor would the object of it be yielded to him, because of the prevarication of which he has been guilty. The agent, in this instance, therefore, resembles a father or an executor, who makes an acknowledgment prejudicial to the infant under his charge in the assembly of the *Kāzee*, which is of no effect; whence if they should afterwards prefer a claim to the object of it, and adduce evidence to prove their right, it would not be admitted, nor would the article in dispute be given to them.

Agency for the receipt of a debt, committed to the *surety* for the debt, is invalid.

If a person be surety for property in behalf of a debtor, and the creditor appoint the said surety his agent for the receipt of the debt, such agency is absolutely invalid, for two reasons.—FIRST, the business of an agent is to *act in behalf of another*; and if the agency of the surety were supposed to be valid, it would necessarily follow that he acts as agent in behalf of his *own person*, in order to exempt himself from responsibility; and thus one of the essentials of agency (namely, *action in behalf of another*) would be destroyed.—SECONDLY, if the agency be valid, it necessarily follows that in case the agent were to say “he had received the debt,” his assertion is credited, (since an agent is a trustee*:) and this conclusion must be rejected in the

* Arab. *Ameen*;—meaning a *confident*; one whose word must be relied upon.

present instance, as the agent's assertion cannot be credited, since in it he endeavours to exempt himself from responsibility. The agency, therefore, is invalid, because of the inadmissibility of the conclusion arising from it.—It is to be observed that the agent, in this instance, resembles the owner of a *Mazoon*, or privileged slave, involved in debt.—In other words, if the master of an insolvent *Mazoon* were to emancipate him, so as to be himself responsible for his value to the creditors*, and the creditors demand payment of the whole of the debts from the slave, appointing the master agent for the receipt of them, the agency would be invalid, because of the two reasons above recited, in treating of the agency of a *surety*.

If a person plead his being agent for the receipt of a debt due to another person who is absent, and the debtor verify his assertion, in this case he [the debtor] must be directed to deliver the debt to the agent; because his verification of the claim is an acknowledgment against himself, since what the agent receives is purely the property of the debtor.—If, therefore, the absent person afterwards appear, and verify the assertion of the agent, there will be no contention whatever: but if otherwise, the debtor must again pay the debt to the absentee, (who is now present,) because his former payment of it is not established, as the creditor denies the agency; and his denial of agency, if confirmed by an oath, must be admitted.—The former payment through the agent is therefore invalid; and the debtor is consequently entitled to retake from him whatever he had paid to him, provided it be still extant in his possession; because his object, in making the payment, was to free himself from responsibility; and as this object has not been fulfilled, he has therefore a right to retake it.—If, however, the thing be not extant in the possession of the agent, but have been destroyed, in that case the debtor is not entitled to retake any thing from the agent, since he, by his verification, ac-

Case of a plea of agency urged for the receipt of a debt in absence of the constituent.

* See *Manumission*, Vol. I. Book V.

known the right of the agent to the receipt of it.—As the debtor, however, in this instance, suffers an oppression from his credulity, and it is not lawful for the oppressed to oppress others, he is not allowed to take any thing from the agent, in case of the destruction of the thing given to him;—unless, at the time of making the payment to the agent, he had taken the agent himself as security for the restitution, in the event of the absent person's denial of the agency; in which case it would be lawful for him to retake whatever he may have paid, as the agent became surety, and is consequently liable for it.

OBJECTION.—The security, in this case, ought not to be valid, since it is essential to the validity of bail or security that there be a debt due by the surety; and the surety, in the present instance, is the *constituent*, who does not owe any debt.

REPLY.—The security is valid, because it is referred to the period when the constituent shall have received the *second* payment of his debt; in which case he is responsible in the conception of both the *agent* and the *debtor*; the security is therefore valid, in the present instance, in the same manner as in all other cases.

—If, on the other hand, a person should plead his being the agent of a certain absentee for the receipt of a debt due to him, and the debtor, without either verifying or falsifying his claim, remain silent, and yet pay the debt, and the proprietor of the debt afterwards appear and exact payment of it from the debtor, he (the debtor) is in this case entitled to a repayment from the agent, because he did not verify the agency; for in fact he did nothing else than make a payment in the hope that it would be acquiesced in by the constituent; and, on his being disappointed in this hope, he is consequently entitled to an indemnification from the agent.—The law is also the same where the debtor pays the debt to the agent, after falsifying his claim; as is obvious from the reasons already stated.—It is however to be observed that, in the several cases of *verification*, *falsification*, or *silence*, it is not permitted to the debtor to retake the article from the agent, after the delivery of it to him, until such time as the constituent appears; be-
cause

cause the payment he has made is the right of the constituent from *probability*, (as in the case of his *verification*,) or from *construction*, (as in the case of his *falsification* or *silence*,) since it is possible that the absentee may afterwards give his assent to it.—It is, therefore, the same as if he had paid the debt to a *Fazooler*, or unauthorized person, in the hope that the proprietor would confirm it; in which case it is not lawful to take back from the *Fazooler* what he may have delivered to him; because there exists a possibility of a confirmation of it by the owner; and also, because it is a general rule that, when a person performs an act with any particular view or object, he ought not to undo the same unless he be disappointed of the object which prompted it.

If a person plead his being the agent of a certain person for the receipt of a *deposit*, and the trustee verify his assertion, yet the law does not award the delivery of the deposit by the trustee to this person, since (in opposition to the preceding case of a *debtor*) the trustee here makes an acknowledgment with respect to the property of another.—If, however, the person in question plead that “his father “having died, the said deposit had devolved by inheritance to him, “and that there were no other heirs,” and the trustee verify this, he must be directed to deliver the deposit to this person; because the trust is no longer the father’s property, after his decease; and the trustee and the person in question are both agreed in its being the property of the heir:—the trustee, therefore, must be directed to deliver his trust to this person, as being the heir.

If a person plead that he had purchased a deposit from the proprietor of it, and the trustee verify his assertion, yet the trustee is not entitled to deliver the deposit to him; because the verification of the trustee during the lifetime of the depositor is an acknowledgment with respect to the property of another: and hence their assertions (namely, that of the trustee and of the person who prefers the claim)

Case of a plea of agency urged for the receipt of a trust, in absence of the constituent.

A person commissioned to receive a trust, on the plea of having purchased it, is not entitled to receive it from the trustee.

are

are not valid, with regard to the establishment of proof of the sale on the part of the proprietor.

A person commissioned to receive a debt, is entitled to receive it, although the debtor plead his having already paid it.

If a person appoint an agent for the receipt of a debt due to him, and the debtor plead that he had acquitted himself of the debt to the proprietor, yet it is incumbent on him to pay the debt to the agent; because the agency is here clearly established; but the debtor's acquittance is not established by his assertion: he is therefore not permitted to delay the payment;—but after he has made the payment, he has a claim upon the creditor, and may exact an oath from him: but an oath cannot be exacted from the *agent*, since he is only a *substitute*.

The seller of an article cannot be compelled to take back the article from the purchaser's agent, on a plea of defect, until the purchaser swears to the defect.

If a person purchase a female slave, and afterwards plead a defect in her, and appoint an agent to manage the litigation with the seller, on this account, and then disappear,—and the agent accordingly institute a suit against the seller for the defect, and the seller plead that the purchaser had knowingly acquiesced in that defect,—in this case the slave is not to be returned to the seller; but a suspension must take place until the appearance of the purchaser, who will then be required to declare upon oath that he did not acquiesce in the defect.—It is otherwise in the case of a *debt*, (as before recited;) for there the debt must be paid to the agent for seizure, in behalf of the creditor, notwithstanding the debtor may plead his having previously acquitted himself of it; because it is there practicable to make a reparation, by enjoining restitution from the agent of the amount he may have received, on the error being made apparent by the constituent refusing to swear; whereas, in the case in question, if an annulment of the sale were decreed in consequence of the defect, it cannot afterwards be revoked, since a decree for dissolving a sale takes full effect, and continues in force, although an error should afterwards appear with respect to the defect pleaded.—This is the doctrine of *Haneefa*: according to whom, also, an oath cannot be tendered to the purchaser, after

after the annulment of the sale, and the return of the subject of it, since it is then to no purpose.—In the opinion of the two disciples, also, the sale ought in this case to be annulled, and the subject of it returned, without a suspension of it on the oath of the purchaser, since (according to them) a reparation is practicable, even in this case, because, if an error should appear in the decree of the *Kâzee*, in consequence of the constituent's refusal to swear, then the decree becomes null, and the subject of the sale is returned to the purchaser.—Some have said that, according to *Abou Yoosaf*, the most authentic doctrine is that in both cases a suspension should take place;—that is to say, in the case of the *debt*, the payment to the agent ought to be deferred, and in the case in question the return of the subject of the sale to the agent of the buyer ought also to be deferred;—because he directs his attention to the interest of the *seller*; (whence it is that if the purchaser should afterwards appear, an oath is exacted from him without the necessity of the seller's preferring a formal plea for it:)—the return, therefore, of the article sold, by the purchaser's agent, is suspended, until the purchaser himself appear and make oath,—out of tenderness to the right of the *seller*.

IF a person give another ten *dirms*, in order that he may give them to the family of this person for their maintenance, and the agent, instead of the specific *dirms* he had received, give ten *dirms* of his own, this is not a *gratuitous* payment; on the contrary, he is entitled to retain the specific *dirms* he received in lieu of those he gave; because an agent for the delivery of maintenance is like an agent for purchase; and such is the law, as has been already related, in treating of an agent for purchase.

A person receiving money, to appropriate to a particular purpose, may pay his own money in lieu of it.

C H A P. IV.

Of the *Dismission of Agents.*

A constituent may dismiss his agent at pleasure; except where the right of another person is concerned.

It is lawful for a constituent to dismiss his agent, because the agency being *his right*, he may consequently, if he please, annul it: excepting, however, when the right of another is interwoven with it; as where the agent is an *agent for litigation*, appointed at the request of the *plaintiff*, in which case the constituent (who is the defendant) cannot dismiss the said agent, because of the connexion of the right of the plaintiff, since, if he should dismiss him, the right of the plaintiff would be set at nought. The agency in this instance, therefore, resembles agency interwoven with a contract of pawnage, by the pawner, at the time of settling the contract of pawnage, appointing a person his agent for the purpose of selling the pledge, and with the price so obtained discharging the debt due to the pawn-holder; in which case, as the right of the pawn-holder is connected with the agency, it is in the power of the constituent to dismiss such an agent; and so also in the present instance.

An agency continues in force, until the agent receives due notice of his dismissal.

If a constituent dismisses his agent, and the agent should not receive any intelligence of it, his agency continues in force until he be apprised of his dismissal; and all his acts until then are binding, as his dismissal is a detriment to him; because it annuls his power of action; and also, because the rights of contracts of purchase and sale appertain and result to him; and accordingly, an agent for purchase does himself pay the price from the estate of the constituent, and an agent for sale delivers the subject of the sale to the purchaser; if,

if, therefore, the dismissal were to operate instantaneously, without his intelligence, and he should, under these circumstances, either make a payment of the price, or delivery of the goods, he must, in such case, become responsible, which is an injury to him.—It is to be observed that agents for *marriage*, or the like, are in this respect considered in the same light.—A question has been started whether it is requisite that the notification of the dismissal of an agent be made by *two* men, or by *one* upright man: but as the law, on this head, has already been laid down in treating of the duties of the *Kāzee*, (under the head of *Decrees relative to Inheritance*,) it is here unnecessary to repeat it.

If a constituent die, or become an absolute idiot, or having apostatized, be united to a hostile country, in all these cases the commission of his agent becomes null; because a commission of agency is not a thing of an *absolute* or *irrevocable* nature, since it is in the power of the constituent, without the consent of the agent, to dismiss him; and such being the case it necessarily follows that the existence of it must depend on the existence of the power which created it originally, as it is requisite that the constituent should, during every moment of its existence, continue to possess the same power or capacity with respect to its formation, as he did at the beginning;—and this power or capacity ceases in consequence of the abovementioned accidents.—The *absolute* idiotism here mentioned is conditioned by *Kadoore*, as a *small* degree of it stands only as a temporary deprivation of *sense*.—The limit of absolute idiotism, according to *Abou Yoozaf*, is fixed at *one month*, since by that space of lunacy the duty of fasting is remitted.—It is also related, as an opinion of *Abou Yoozaf*, that its limit is no more than *one night and one day*, since by that space of idiotism the observance of the five stated prayers is remitted,—whence it is that an idiot in that degree is considered as *defunct*.—*Mohammed* has said that the limit ought to be extended to a *complete year*, since in that space of time idiotism occasions the omission of all the religious duties prescribed

A commission of agency is annulled by the death, confirmed lunacy, or apostacy of the constituent:

to a *Mussulman*; and that, therefore, from a principle of caution, it ought to be extended to that period.—With respect to the expression “or having apostatized, be united to a hostile country,” (as mentioned in this case,) lawyers observe that it is the doctrine of *Haneefa*; because, according to him, all the acts of a person who simply apostatizes remain *suspended*: if, therefore, he afterwards repent, and return to the faith, his acts (and consequently his commission of agency) are confirmed; but if he be either put to death on account of his apostacy, or fly to the infidels, his acts are rendered void, and his commission of agency is annulled.—In the opinion of the two disciples, on the other hand, the acts of an apostate are valid, and therefore his commission of agency is not annulled, unless in case of his dying, or being put to death, or being expatriated, by a decree of the *Kâzee*.

but not by
apostacy if the
constituent be
a woman.

If the constituent be a woman, and apostatize, her constitution of agency, nevertheless, remains binding until her death, or until her removal to an infidel country, because it has been determined that the apostacy of a woman has no effect on her *contracts*, such as *sale*, or the like.

Cases in
which an ap-
pointment of
agency by a
Mokâtib, a
Mazoon, or a
copartner, are
annulled.

If a *Mokâtib* appoint an agent, and afterwards become incapable of discharging his ransom,—or, if a privileged slave appoint an agent, and afterwards be laid under restrictions,—or, if one of two partners appoint an agent, and the partners should afterwards separate and dissolve their partnership, in all these cases the agency becomes null, whether the agent may or may not have received intelligence of these supervenient circumstances, (such as the incapability of the *Mokâtib*, and so forth,) for the reason already assigned, that “the continuance of agency depends on the continual existence of the power and capacity of the constituent to create it;” which power discontinues in consequence of any of the above circumstances. Now this reason obtains in either case; (that is, whether the agent be informed of these circumstances,

circumstances, or *not*;) in either case, therefore, the agency is annulled.—The reason of this is that the dismissal of the agent is a dismissal *by effect* and of *necessity*, and therefore does not rest upon his knowledge;—in the same manner (for instance) as an agent for sale is dismissed when the thing is sold by the constituent; in which case the agency necessarily ceases, as the *subject* of it no longer remains.

(If an agent should die, or become an absolute idiot, the agency ceases; because the *continuance* of agency stands on the same ground as its *commencement*; and as, at the commencement, it is requisite that the agent be capable of executing the orders of his constituent, it follows that the continuance of this capacity is a condition of the continuance of the agency; and this capability ceases in the present instance, in consequence of the death or idiotism.—In the same manner also, if an agent apostatize and go to an infidel country, his acts are not binding; unless he again become a *Mussulman*, and return, in which case the agency reverts to him.—The author of this work observes that this is according to *Mohammed*; but that, according to *Abou Roosaf*, the agency does not revert, notwithstanding the agent's returning to the faith and to his country.—The argument of *Mohammed* is that a commission of agency is a *latitude*, or *endowment with power of action*, as it is the renewal of the bar to such power, which would otherwise oppose itself. Now the agent's power of action, so far as merely regards *himself*, rests upon the existence in him of certain qualities, namely *rationality*, *freedom*, and *maturity of years*; and he has been rendered incapable of exerting that power merely by a supervenient circumstance, (namely, his desertion to a hostile country;) when, therefore, the cause of this disability is removed, if the latitude still continue in force, he again becomes an agent, as before. The reasoning of *Abou Roosaf* is that a commission of agency is an investiture with a power of *passing*;—in other words, the agent, in virtue of his commission, is possessed of a power of *passing* his acts, so that

A commission of agency is annulled by the death or lunacy of the agent;

or, by his apostacy and flight to a hostile country.

Agency for a person is annulled by his desertion to a hostile country, and by his apostacy and flight to a hostile country.

they shall be binding upon another, namely, his constituent: in short, in virtue of his appointment, he is invested with the power of *passing* his acts, but not with the power of *performing* those acts; as *this* power he possessed in virtue of his *natural competency*.—Now the power of *passing* acts, or, in other words, *agency*, ceases on apostacy and desertion to a hostile territory, as these circumstances are held to be the same as the *death* of a *Mussulman*; and it does not afterwards revive on the agent's again becoming a *Mussulman*, and returning to the abode of the *Mussulmans*; in the same manner as (in such a case) the property in an *Am-Walid* or a *Modabbir* does not revive; in other words, if a master apostatize and go to the abode of the infidels, his *Modabbirs* and *Am-Walids* become free, and his property in them does not revive in case of his returning to his faith and his country*.

Agency is not renewed by the repentance and return of an apostate constituent.

If a constituent become a *Mussulman*, and return to the country of the *Mussulmans*, after having apostatized and gone off to a hostile country, the power of his agent, which had been annulled, does not in that case revive, according to the *Zâbir-Rawâyet*.—*Mohammed* is of opinion that the agency revives, in the same manner as in the preceding case of the apostacy of the *agent*.—The reason for the distinction (according to the *Zâbir-Râwayet*) between the case of an apostate *constituent* and an apostate *agent* is, that the foundation of agency, with respect to a *constituent*, is *property*, which becomes null in consequence of apostacy; but the foundation of it, with respect to an *agent*, is *rationality, freedom, skill, and maturity of years*, circumstances which are not extinguished by apostacy.

Agency for any particular act is annulled by the constituent himself performing that act.

If a person appoint another his agent for any particular concern, and afterwards execute that concern himself, the agency in such case becomes null.—This case admits of a variety of modes; as where, for instance, a person appoints an agent to emancipate his slave, or to make him a *Mokâtib*, and he afterwards himself emancipates, or makes a *Mokâtib* of, the slave,—or, where a person appoints an agent for the

* See vol. II. p. 222.

contracting

contracting of marriage between him and a particular woman, and he himself afterwards concludes the contract,—or, where a person appoints another his agent for the purchase of a specific article, and he himself afterwards purchases that article,—or, where a person appoints a person to divorce his wife, and he himself afterwards divorces her three times, (or divorces her *one* time, and her *edit* expires,)—or, where a person appoints an agent to conclude a *Khoola* with his wife, and he himself afterwards concludes the *Khoola* with her;—for in all these cases the agency (because of its impracticability in consequence of the anticipation of the constituent in the performance of these acts) is null; insomuch that, in the case of *marriage*, if the constituent should afterwards irrevocably divorce the woman he had so married, it would not then be lawful for the agent to contract a marriage with her in behalf of the constituent, because the object of the constituent, in the agency, had been already obtained, and the necessity of it, of consequence, no longer existed. (It is otherwise, however, where the *agent* contracts the woman, and afterwards divorces her in behalf of the constituent; because, in this instance, the constituent's object in the agency has not been obtained, and consequently the necessity for it still exists.)

If a person appoint another his agent for the sale of a slave, and afterwards sell that slave himself, and the purchaser return the slave to him, in consequence of a decree of the *Kāzee*, founded on the proof of a defect, it is related as an opinion of *Abou Yoozaf*, that the agent is not then entitled to sell the said slave, because the constituent, in selling him himself, did virtually prohibit the agent from executing the deed, and it consequently becomes the same as if he had dismissed him.—*Mohammed*, on the other hand, alleges that the agent may in this case resell him, because the agency still exists, since (according to him) agency is the *licencing of action*.—It is otherwise where a person appoints an agent for executing a gift, and afterwards makes the gift himself, and again retracts it; for in this case it is not lawful for the agent.

An agency dissolved by any act of the constituent cannot afterwards revive.

agent to make the gift, since the voluntary retraction of it by the constituent did clearly indicate his wish that it should not take place: in opposition to the case of the return of the subject of a sale founded on a decree of the *Kāzee* to the constituent, because there the constituent acts from necessity in the receiving of it; and there exists of course no argument to shew that he does not wish the sale to take place: when, therefore, the subject of the sale, in consequence of being returned, becomes completely his property, the agent is entitled to resell it.

HEDÂRA.

with to avoid the litigation is compellable to sustain it. Some have defined a plaintiff, with respect to any article of property, to be a person who, upon his being interested in the said article, has no right to it but by the establishment of proof; and a defendant to be a person who has a plain right to it without proof.

H E D A A.

who claims it is interested. But it requires skill and knowledge or intelligence to distinguish the degree of interest; as the weak and not the strong are interested; and it frequently happens that a person is

in appearance the plaintiff, whilst in reality he is the defendant. Thus a trustee, when he pays to the owner of the deposit, I have received

to you your deposit, appears to be plaintiff, in as much as he pleads the return of the deposit; yet in reality he is the defendant, since he denies the return of the deposit.

corroborated by an oath, must be credited.

B O O K XXIV.

Of DĀWEE, or CLAIMS

Chap. I. Introductory.

Chap. II. Of Oaths.

Chap. III. Of *Takhālif*; that is, swearing both the *Plaintiff* and the *Defendant*.

Chap. IV. Of Things claimed by two *Plaintiffs*.

Chap. V. Of Claim of Parentage.

C H A P. I.

THE *Moodāa*, or *plaintiff*, is a person who, if he should voluntarily relinquish his claim, cannot be compelled to prosecute it; and the *Moodāa-ali-bee*, or *defendant*, is a person who, if he should wish

Distinction between plaintiff and defendant.

with to avoid the litigation, is compellable to sustain it.—Some have defined a plaintiff, with respect to any article of property, to be a person who, from his being disseized of the said article, has no right to it but by the establishment of proof; and a defendant to be a person who has a plea of right to that article from his seizure or possession of it. *Mohammed*, in the *Mabsoot*, has said that a defendant is a person who *denies*.—This is correct: but it requires a skill and knowledge of jurisprudence to distinguish the denier in a suit; as the *reality* and not the *appearance* is efficient; and it frequently happens that a person is in appearance the *plaintiff*, whilst in reality he is the *defendant*. Thus a trustee, when he says to the owner of the deposit, “I have restored “to you your deposit,” appears to be *plaintiff*, in as much as he pleads the return of the deposit; yet in reality he is the *defendant*, since he denies the obligation of responsibility; and hence his assertion, corroborated by an oath, must be credited.

A plaintiff must particularly state the subject of his claim;

which (if it be moveable property) must be produced in court.

No claim is admissible unless the plaintiff explain the species and quantity of the article which is the object of it; because the end of a claim is, upon the establishment of the proof, to obtain a decree of the *Kâzee* for rendering the matter obligatory upon the defendant; but no obligation can take place with respect to a matter of *uncertainty*.—If, therefore, the article be still existing, and in the possession of the defendant, he is required to produce it in the court of the *Kâzee*, in order that the plaintiff may pointedly refer to it in the exhibition of his claim. In the same manner, the production of it is necessary at the time of the delivery of testimony, or of the administration of an oath to the defendant; because on these occasions the greatest possible degree of certainty and knowledge is requisite; and this is best answered by a *pointed reference* with respect to *moveable property*, such as may be brought into the court of the *Kâzee*, since a pointed reference most completely ascertains and determines any thing.

WHEN

When the claim of the plaintiff is of a valid nature, the appearance of the defendant is necessary. This practice has been followed by *Kazee* in all ages. It is, moreover, incumbent on the defendant to give a reply to the plea, when he is present, in order that the object of his presence may be answered. It is also necessary to produce the *subject* of the claim, for the reason already stated. It is likewise incumbent on the defendant, in case of his *deceit*, to take an oath, as shall be explained in the latter part of this chapter. If the subject of the claim be not present, a bare explanation of the *quality* of it is not sufficient; for it is indispensable, in this case, that the *value* be specified, in order that the subject of the claim may be fully ascertained; because the substance of an entity is known by an explanation of its *value*, and not by that of its *quality*, since many individuals of that genus may partake of the same qualities; and as an *actual fight* of the article is, in this instance, unattainable, an explanation of the value is accepted in the place of a pointed reference to it. (The lawyer *Abou Leys* has said that to an explanation of the *value* ought to be added that of the *gender*.) If the claim relate to land, or other immoveable property, it is requisite that the plaintiff define the boundaries, and say "that land is in the possession of the defendant, and I claim it from him;"—because such property cannot be described by a pointed reference, as it is utterly impossible to produce it in the assembly of the *Kazee*; a definition of the boundaries therefore suffices, as immoveable property may be ascertained by such a definition. It is necessary to define the *four* boundaries, and to specify the proprietors of each, adding a description of their family, in which is required to go at least as far back as the *grandfather*,—since (in the opinion of *Hameefa*) a knowledge of the grandfather is essential to the complete description of a family: and this is approved. If, however, the proprietor of the boundary be a person of notoriety, the simple mention of him is sufficient. If, also, only *three* of the boundaries be defined, it is sufficient, according to our doctors; (contrary to the opinion of *Ziffer*;)—because a definition is in this case made of a *majority* of them;

The defendant must appear, to answer to a valid claim;

and must produce the subject of it;

or the value of it must be specified.

or (if the object consist of *land*) the plaintiff must define the boundaries, &c. and must make an explicit demand of it.

and the *majority* is equivalent, in effect, to the *whole*.—It is otherwise where all the four boundaries are mentioned, and there happens to be a mistake with respect to one of the four, for in this case the claim is falsified: in opposition to the case where a definition of one of them is omitted, as that does not induce a falsification of the claim.—(It is to be observed that, in the same manner as a definition of the boundaries is requisite in a *claim* regarding immovable property, so is it also requisite in *giving evidence*.)—With respect to what was before advanced, that the plaintiff must say “*that land is in the possession of the defendant, &c.*” this is indispensably requisite; because the defendant is not liable to the suit, unless he be possessed of the land. As, however, the assertion of the plaintiff and the verification of the defendant is not alone sufficient to prove this, it is requisite that the plaintiff prove the possession of the defendant by the evidence of witnesses, or that the *Kāzee* be himself acquainted with the circumstance. This is approved; because in the assertion of the plaintiff and the verification of the defendant there is room for suspicion, since it is still possible that the land may be in the possession of another, and that they may have agreed in its being in the possession of the defendant, to induce the *Kāzee* to pass a decree.—It is otherwise with respect to *moveable* property, because the seizure of the possessor being, in that case, determinable by sight, there is no necessity for proof by means of witnesses.—With respect to the plaintiff’s saying “*I claim it from the defendant,*” this is also indispensably requisite; because to demand it is his right, and the demand must therefore be made; and also, because it is possible that the land may be in the possession of the defendant in virtue of pawnage,—or detention after a sale of it, to answer the price,—and this apprehension is removed by the claim of it.—Lawyers have observed that because of the above possibility, it is requisite, in a case of moveable property, that the plaintiff declare that the thing is *unjustly* in the possession of the defendant.

It is sufficient, according to our doctors, (contrary to the opinion of some;)—because a definition is in this case made of a majority of them. If

of the tradition above quoted,) must administer an oath to him. The demand of the plaintiff, however, is requisite to the exaction of the oath, as it is his right.

CHAP. II.

Of Oaths.

An oath must not be required of the defendant when the plaintiff's witnesses (although not immediately present) are within call.

If a plaintiff declare that "his witnesses are present in the city, but not in the court of the *Kāree*," and should nevertheless demand an oath from the defendant, in that case (according to *Haneefa*) the defendant must not be required to take the oath. *Aboo Yoofoof* alleges that an oath must, in this case, be exacted from the defendant; because it is established, by the tradition before cited, that an oath is the right of the plaintiff; and it must consequently be granted to him in case of his demanding it. The reasoning of *Haneefa* is that the establishment of a right in the plaintiff to exact an oath from the defendant is founded on the supposition of his inability to produce evidence, as is expressly declared in the above mentioned tradition.—Hence until his inability to produce evidence be made apparent, his right does not take place, any more than if the witnesses were present in the court of the *Kāree*. The opinion of *Mohammed* (as reported by *Khafoof*) coincides with that of *Aboo Yoofoof*: according, however, to a report of *Tabāree*, it coincides with that of *Haneefa*.

An oath cannot be exacted from the plaintiff.

An oath cannot be exacted from the plaintiff, because of the saying recorded in the traditions of the prophet, "evidence is incumbent on the plaintiff."

“the part of the APPELLANT, and an oath on that of the RESPONDENT;” from which it is evident that an oath is not in any shape incumbent on the plaintiff; otherwise the necessity of it would not have been restricted to the *respondent* or *defendant*.—(*Shafëi*, however, dissents from this doctrine.)

If both the actual possessor [of the property] and the plaintiff should adduce evidence in support of their absolute right of property, in this case the evidence of the person in possession must be rejected and that of the plaintiff admitted.—*Shafëi* maintains that the evidence of the possessor must be admitted, and a decree passed in his favour; because the evidence is corroborated by the *possession*, and is consequently strong and apparent; it ought therefore to be preferred, in the same manner as evidence in favour of the possessor is preferred in cases of *birth*, *marriage*, or a claim to a slave that has been emancipated, or that has become an *Am-Walid*, or been constituted a *Modabbir*:—in other words, if two persons should severally assert that a particular horse, in the possession of one of them, was the offspring of a horse belonging to him, and if each should bring evidence in support of his assertion, in that case the evidence of the possessor would be preferred; and so also in the case of a contested wife who is in the possession of one of the two claimants,—or in the case of a *freedman*, an *Am-Walid*, or *Modabbir*, who is in the possession of one of the two persons who claims the right of property.—In reply to this reasoning of *Shafëi*, our doctors argue that it is not the evidence adduced by the possessor which proves the absolute right of property, because the possession of itself indicates the absolute right, and consequently anticipates the proof, which would else have resulted from the evidence. It is otherwise with respect to the evidence adduced by the person not in possession, because by that an absolute right of property is proved*; and

The evidence adduced on the part of the plaintiff must be preferred to that adduced on the part of the defendant.

* As it is not anticipated by any other circumstance, and consequently must be admitted.

as the evidence on the part of the person not in possession occasions proof, it is therefore admitted, since as the purpose of evidence is to establish proof, the evidence which occasions proof must be preferred. It is to be observed that possession indicates a right of property *absolutely*, but not *relatively*, as in the cases adduced by *Shaf'ei*; and hence the analogy conceived by him between these cases and the case in question is not just.

The defend-
ant refusing
to swear, the
Kāzee must
forthwith
pass a decree
against him.

If the defendant refuse to take an oath in a case where it is incumbent upon him, the *Kāzee* must then pass a decree against him because of his refusal, and must render obligatory upon him the object of the claim on behalf of the plaintiff.—*Shaf'ei* maintains that the *Kāzee* must not pass a decree immediately on the refusal of the defendant, but must first administer an oath to the plaintiff, and then pass a decree against the defendant; because the refusal to take an oath admits of three different constructions:—I. it may proceed from a desire to avoid a false oath;—II. it may proceed from an unwillingness to take an oath, although, in testimony of the *truth*, from an opinion of its being derogatory to the deponent's character; and, III. it may proceed from a doubt and uncertainty whether the matter be true or false;—and as the refusal to take an oath is a matter of uncertainty, it cannot amount to *proof*, (since every thing of an uncertain nature is incapable of constituting proof;) and as the oath of the plaintiff manifests the right, recourse must therefore be had to *that*.—The arguments of our doctors, on the other hand, are that the refusal of the plaintiff to take an oath, indicates either a concession of the thing claimed, or an acknowledgment of the validity of the claim; since, if the case were otherwise, he could have no motive to refuse an oath when the maintenance of his right depended upon it.—Besides, there are no grounds on which an oath can be tendered to a *plaintiff*, since the tradition before mentioned expressly evinces that an oath is restricted to the *defendant*.

It is incumbent on the *Kāzee* to give three notifications to the defendant, by three times repeating to him "I tender you an oath; which if you take, it is well; if not, I will pass a decree in favour of the claimant."—This *threefold* repetition is required because of the want of certainty in cases of refusal to take an oath, since there subsists a disagreement with regard to the validity of passing a sentence upon it.—(The necessity of the repetition has been recited by *Khasaf*, as from a principle of *caution*, and to cut off the defendant from any further pretence.)—It is, indeed, an established tenet, that if a decree be passed on *one* notification only, it is valid; and this is approved doctrine.—It is most laudable, however, to give three notifications.

The *Kāzee* must give three separate notifications to the defendant.

A REFUSAL to take an oath is of two kinds: I. *real*, (where the defendant expressly says "I will not take an oath;") and, II. *virtual*, (where he remains silent.)—The effect in this latter case is the same as in the former, provided it be known that the person refusing is neither deaf nor dumb. This is approved doctrine.

Refusal to swear is of two kinds, *real* and *virtual*.

If a man claim marriage with a woman, or a woman with a man, and the defendant in either case deny the claim, then (according to *Haneefa*) it is not necessary to exact an oath.—The law is the same (according to *Haneefa*) with respect to a claim of reversal [after divorce,] or of rescindment in a case of *Aila*,—or a claim of servitude, or a claim of offspring, or claims of lineage, *Willa*, punishment, and *Laan*. Thus if, in a case of divorce, the wife, after the expiration of her *edit*, were to advance a plea of reversal against her husband, or the husband to advance a plea of reversal against his wife, and the defendant should, in either case, deny the claim,—or if, in a case of *Aila*, either of the parties were to plead a rescindment from the vow, and the other to deny it,—or, if a person were to claim the right of slavery to another whose condition is unknown, or he whose condition is unknown claim his being the slave of that other, and the defendant,

An oath cannot be exacted from the defendant in claims respecting marriage, divorce, *Aila*, *ben-dage*, *Willa*, punishment, or *LAAN*.

in either case, deny the claim,—or, if a female slave were to plead her being an *Am-Walid* to a particular man, and that a certain person is their offspring, and the man himself deny it*,—or, if a person were to plead that another of unknown birth is his son, or that other plead that this person is his father, and the defendant in either case deny the claim,—or, if a person were to plead that another of known condition had been emancipated by him, and that he therefore possesses the right of *Willa* over him, or that other plead that he had been emancipated by him, and the defendant, in either case, deny the claim,—or, if a person were to plead that another had committed whoredom, and that other deny it,—or, lastly, if a wife should plead that her husband had slandered her,—in all these cases it is not necessary (according to *Haneefa*) to exact an oath from the defendant.—The two disciples maintain that it is requisite to exact an oath from the defendant in all these cases, excepting in the cases of punishment, or of *Laan*;—for they argue that a refusal to take an oath amounts to an acknowledgment, as such refusal is an argument that the party is false in his denial: a refusal to take an oath is, therefore, an acknowledgment either in *reality* or in *effect*; and acknowledgments are admitted in all the above cases. This species of acknowledgment, however, is of a *doubtful* nature, as it is not a perfectly *valid* acknowledgment; and punishment is remitted in consequence of any doubt; and as *Laan* is also punishment in effect, they hold that, in that instance also, an oath cannot be imposed.—The reasoning of *Haneefa* is that a refusal to take an oath amounts to a concession of the object to the plaintiff; after such refusal, therefore, it remains unnecessary to exact an oath, because of the attainment of the object independant of it.—(It is most laudable to consider the refusal to swear in the light of a grant or concession, as it avoids the consequence of the defendant falsifying in his denial.)—Now as a

* This case does not, like all the rest, hold true when the terms of it are reversed; for in case the claim should have been made on the part of the *man*, it is considered as an acknowledgment, and the denial of the woman is then of no effect.

refusal to take an oath is shewn to be a concession of the thing in dispute, it follows that such refusal can have no effect in the above cases, since they are not of such a nature as admit of concession: an oath, therefore, is not exacted from the defendant in such cases; because the advantage proposed, in exacting an oath, is to enable the *Kázee* to pass a decree in consequence of the refusal; and this advantage cannot be obtained in such cases.

OBJECTION.—If a refusal to take an oath be equivalent to a concession, the refusal of a *Mokátib*, or of a *privileged* slave, ought not to be admitted, since neither of these are competent to make a concession.

REPLY.—A refusal to take an oath is considered as a concession, in order to remedy the evil of contention:—the refusal of *Mokátibs* and *privileged* slaves is therefore admitted.

OBJECTION.—If a refusal to take an oath be a concession, it ought not to be admitted in claims of *debt*, since the subject of a gift must necessarily be *substance*, whereas a debt relates merely to *quality*.

REPLY.—The validity of a concession of this nature, in cases of debt, is admitted in conformity with the conception of the plaintiff; for he conceives the thing he receives to be that actual thing to which he is entitled. Besides, *concession*, in this instance, merely means a *cessation of obstruction*; that is to say, the defendant does not obstruct the plaintiff from taking his property, and he accordingly takes it, as property is a matter of but light concern.—It is otherwise with respect to the particulars before mentioned, as these are not matters of light concern, and hence it is not lawful for the defendant to make a *gift* of them.

AN oath must be exacted from a thief; and if he should refuse to take it, he becomes liable for the property, but does not subject himself to the penalty of amputation; because his act involves two consequences, namely, responsibility for the property, and the loss of his

A thief refusing to swear becomes liable for the property stolen.

hand; and as his refusal establishes the *first* consequence, but not the *second*, it is therefore the same as if the fact had been proved by one man and two women, in which case a responsibility for the property takes place, but not a loss of the hand.

A claim founded on divorce before consummation entitles a wife to her *half dower*, where the husband declines swearing.

If a wife advance a claim against her husband, by asserting that he had divorced her previous to consummation, an oath must be tendered to the husband, and if he refuse to take it, he becomes responsible for her *half dower*, according to all our doctors, because (according to them) oaths are admitted in cases relative to divorce, and particularly where the object is *property*.—In the same manner also, oaths are admitted in cases of marriage, where the wife claims her dower, as this is a claim relative to property, which is established by a refusal to take an oath, though the *marriage* be not thereby proved.—In the same manner also, oaths are administered in claims of parentage, where the claim relates to some right, such as *inheritance* or *maintenance*, (as where a disabled person claims that he is the brother of another, and that his maintenance is incumbent upon that other, who denies the same.)—In cases also of invalid recessions from gifts, (as where, a person wishing to retract his gift, the grantee asserts that he is his brother, and that, on account of such relation, he has no right to retract,—and the granter denies the same,)—an oath is tendered to the defendant, as the objects of them are the rights alluded to. An oath is not tendered, according to the two disciples, in simple cases of consanguinity, unless where the relation is of such a nature as to be established by the acknowledgment of the defendant: as where a person, for instance, asserts that another person is his *father*, or his *son*,—or a woman asserts that a certain person is her *father*,—or a man or woman claims a right of *Willa*, or a man or woman claims marriage,—in which cases, if the defendant acknowledge the relationship, the *Willa*, or the marriage, they are established accordingly; and if the defendant *refuse* to make oath, this (according to the two disciples) is equivalent to acknowledgment. It is otherwise where

Pleas of consanguinity admit of an oath being tendered to the defendant.

where a woman alleges that a certain person is her *son*, because in that case the relationship depends on *another*, and therefore, as the acknowledgment of the defendant can have no effect, so neither will his refusal to take an oath.

If a person claim a right of retaliation upon another, and the defendant deny it, in this case (in the opinion of all our doctors) an oath must be administered to him.—If he refuse to take it, and the retaliation relate to the *members of the body*, he must in that case suffer retaliation; but if it relate to *murder*, he must be imprisoned until he either confess or take an oath of exculpation.—This is according to *Haneefa*.—The two disciples are of opinion that in either case a *fine* must be imposed; because, although (according to their doctrine) a refusal to take an oath is an *acknowledgment*, yet it is attended with a degree of doubt, (as has been already explained;) and consequently cannot establish *retaliation*:—a fine of property is therefore due; especially where the bar to the retaliation arises from a circumstance on the part of the person who is liable to the retaliation; as when the avenger of blood claims for *wilful* murder, and the defendant acknowledges *erroneous* murder.—The argument of *Haneefa* is that the members of the body of a man are considered in the same light with *property*, and hence a concession with respect to them is admitted in the same manner as it is admitted in the case of *property*; for if a person should say to another “cut off my hand,” and that other accordingly cut it off, he would not be subject to any compensation, which clearly proves that the concession thereof is lawful, although it be not allowed to the man, in this instance, to cut off the hand*, as it is attended with no advantage to him.—In short, concessions are allowed with respect to *parts* of the body, but not with respect to the *body itself*; and as a refusal to swear, in cases of retaliation with respect to the *parts* of the body, is a con-

Case of a
claim of re-
taliation.

* In other words, “to accept of the gift or concession.”

cession of an advantageous nature, (as being the means of terminating a contention,) it follows that the cutting off the hand is advantageous in this instance, in the same manner as it is advantageous to amputate a limb in a case of mortification, or to draw a tooth in case of excessive pain.

Where the plaintiff's witnesses are within call, the defendant must give bail for his appearance for *three days*:

If a plaintiff assert that "his witnesses are in the city," the defendant must, in that case, be required to give bail, to answer for his appearance within the term of *three days*, lest he abscond, and thus the right of the plaintiff be destroyed:—and it is lawful thus to take bail for his appearance, (according to our doctors,) as has been already explained*.—The taking of bail from the defendant, in this instance, immediately on the preferment of the allegation by the plaintiff, proceeds upon a favourable construction of the law, because of its being advantageous to the *plaintiff*, and not materially detrimental to the *defendant*: and the reason for taking it is that it is incumbent upon the defendant to make his appearance in court upon the instant of the claim; (whence it is that a person is immediately dispatched to summon him;) and as this might prevent him from going on with any business in which he may be then employed, it is therefore lawful to take bail for his appearance.—The term of *three days*, as above mentioned, is recorded from *Haneefa*; and that term is approved.—In taking bail (according to the *Zâbir Rawâyet*) there is no difference between an unknown person and one of established note; nor between the claim of a *large* and of a *small* sum. The declaration of the plaintiff, however, that "his witnesses are in the city," is indispensable towards the taking of bail for appearance: and hence, if the plaintiff should say "I have no witnesses,—or, "my witnesses are absent from the city," bail is not in that case to be required from the defendant, as it is of no use†. If, therefore the defendant, in this

but if the witnesses be not within call, bail cannot be required from the defendant.

* See *Bail*, Vol. II. Book XVIII.

† Because the plaintiff, being destitute of witnesses, cannot possibly establish his claim.
instance,

instance, upon being applied to, give bail for his appearance, it is well: but if he refuse, the *Kāzee* must then direct the plaintiff to attend and watch over him, in order that his own right may not be destroyed: excepting, however, where the defendant may happen to be a traveller, or about to travel, for then the plaintiff is to watch over him only whilst in the court of the *Kāzee*; and if he should take bail for his appearance under these circumstances, it must be extended only to the breaking up of the court of the *Kāzee*; because if either the bail or the watching over him were extended to a longer period, it would occasion a detriment to the defendant, in as much as he would be prevented, during that space, from pursuing his journey; but where it is limited to the time of the sitting of the court, he is not subjected to any apparent inconvenience.—The particulars of *watching* or *attendance* will be explained in treating of *inhibition*.

SECTION

Of the Manner of SWEARING, and requiring an OATH.

AN *oath* is not worthy of credit unless it be taken in the name of God, because the prophet has said “*whoever takes an oath, let him take it in the name of God; otherwise let him omit the oath entirely:*” —and also, because he has declared “*whoever takes an oath otherwise than in the name of God is most certainly an ASSOCIATOR*.*”

The oath must be taken in the name of God;

It is incumbent upon the *Kāzee* to desire the swearer to corroborate his oath by reciting the attributes of God.—Thus he must

and the *Kāzee* must dictate the terms of it.

* Arab. *Mushrik*, meaning a *Pagan*, or a *Polytheist*.

direct him, for instance, to say "I swear by the God than whom
 "there is no other righteous God, who is acquainted with what is
 "hidden and apparent, that neither by me, nor on my behalf, is the
 "amount due to Omar which he claims, nor any part of it.—The
Kázee is at liberty either to add or diminish from this oath as he
 pleases: but he must not so far extend his caution as to *repeat* the oath,
 because it is not necessary to swear more than *once*.—If a person
 should swear "by God, by the *merciful*, by the *most merciful*,"—
 it is considered as three oaths: but if the two last particles of swearing
 be omitted it is then only *one*.—It is to be observed that the *Kázee* has
 the option either of adding the corroboration to the oath, or of omit-
 ting it, and simply desiring the defendant to swear "by God."—
 Some have said that it is improper to prescribe the corroboration to
 such as are known to be virtuous, but that to all others it is neces-
 sary.—Others, again, have said that the corroboration is neces-
 sary in claims to a *great* amount, but not where the amount is
small.

Swearing by
 divorce or
 emancipation
 must not be
 admitted.

A DEFENDANT must not swear by *divorce* or *emancipation*, (as if
 he should say, "if the claim preferred against me be just, my wife is
 "divorced," or "my slave is emancipated,") because of the tra-
 dition before quoted.—Some, however, have said that, in our times,
 if the plaintiff should importunately require it, the *Kázee* may then
 administer to the defendant an oath by divorce or emancipation; since
 in this age there are many men who scruple not to swear by the name
 of God, but who are, nevertheless, averse from an oath by *emancipa-
 tion or divorce*.

Jews must
 swear by the
Pentateuch,
 and Christians
 by the *Gospel*.

THE *Kázee* must administer an oath to a *Jew*, by directing him to
 say "I swear by the God that revealed the *Pentateuch* to *Moses*;"—
 and to a *Christian*, by directing him to say "I swear by the God
 "that sent down the *gospel* of *JESUS*;"—because the prophet, upon
 a certain occasion, administered an oath to a *Jew*, by saying to him
 "I desire

"I desire you to swear by the GOD that hath sent down the Pentateuch to MOSES, that such is the law with regard to whoredom in your book;" and also, because the Jews believe in the divine mission of MOSES, and the Christians in the divine mission of JESUS CHRIST.—In the administration of oaths to them, therefore, it is necessary to corroborate them, by a specification of the books which have been received through their respective prophets.

THE Kázeé must administer an oath to a *Majoofee*, by directing him to say "I swear by the GOD that created fire."—This is recorded, by *Mohammed*, in the *Mabsoot*; but it is related of *Haneefa*, in the *Nawádir*, that he never administered an oath otherwise than in the name of GOD.—*Khasáf*, moreover, reports that *Haneefa* never gave an oath to any excepting Christians and Jews, otherwise than in the name of GOD, because in confounding fire with the name of GOD, a reverence is shewn to it to which it is not entitled: contrary to the Old or New Testament, as these are the books of GOD, and therefore entitled to reverence. This doctrine has been adopted by several of our modern doctors.

Pagans must swear by GOD.

AN oath cannot be administered to an idolater otherwise than in the name of GOD, because all infidels believe in GOD, as is evident from this sentence of the *Koran* "IN YE ASK OF THEM (the infidels) WHO HATH CREATED YOU, VERILY THEY WILL ANSWER; "GOD ALMIGHTY."

AN oath must not be administered to infidels in their place of worship, because the *Kázeé* is prohibited from entering such a place.

Oaths must not be administered in an infidel place of worship.

IT is not necessary, in administering an oath to *Mussulmans*, to corroborate it by means of the time or place, (such as by the administration of it on a *Friday*, or in the *masque*,) because the object of an oath

The oaths of *Mussulmans* need not be corroborated by swearing

them at a particular time, or in a particular place.

oath is a reverence to him in whose name it is taken, and this depends not on any particular time or place.—Besides, if the corroboration of oaths to *Musfulmans*, by a restriction to time and place, were necessary, it would subject the *Kázee* to an inconvenience, in the necessity he would be under of attending at the particular time and place; and the law admits not of inconvenience, more especially where the fulfilment of right, or the execution of justice, does not depend upon it.

Cases in which the oath of the defendant must relate to the cause; and cases in which it must relate to the object.

If a person allege that he has bought a slave from another for a thousand *dirms*, and the seller deny the fact; in this case the seller must be required to swear, in the following manner, “I swear by God that there does not absolutely at present exist any contract of sale between me and the plaintiff;”—and not in *this* manner, “I swear by God that I have not sold, &c.”—because it often happens that a sale is made, and afterwards an *Akála*, or dissolution of the contract, takes place.—In cases of usurpation it is necessary that the defendant swear, in the presence of the plaintiff, in this manner, “there is no part of that which you allege that I have usurped from you, due by me,” and not “*I have not usurped, &c.*”—because an usurpation is often done away by the proprietor selling or making a gift of the thing to the usurper.—In cases of marriage it is requisite that the defendant swear to this effect, “no marriage does at this time subsist between me and the plaintiff;”—because a marriage is sometimes dissolved by *Khoola*.—In cases of divorce the husband must swear “this woman is not *at present* finally separated from me, by the divorce which she pleads;”—and not, in an absolute manner, that “he has not divorced her;”—because a new marriage sometimes takes place after a *Talák Báyeen*, or complete divorce.—Thus, in all these cases, the *Kázee* must swear the defendant with respect to the *object* of the plea, and not with respect to the *cause* of it; since, if he were to administer the oath with respect to the *cause*, it might be injurious to the defendant.—What is here advanced is conformable to the opinion of

of *Haneefa* and *Mohammed*.—*Abou Yoosaf* is of opinion that, in all these cases, the *Kāzee* must swear the defendant with respect to the *cause*, (except where the defendant particularly requests the contrary;) because *sales*, for instance, are sometimes made, and afterwards dissolved; *divorces* sometimes executed, and afterwards succeeded by a marriage *de novo*; and usurpations sometimes done away by *gift* or *sale*:—in all these cases, therefore, the oath must be administered with respect to the *object*.—Some have said that the *Kāzee* ought to be guided by the denial of the defendant:—in other words, if the defendant deny the *cause*, let the oath relate to the *cause*,—or, if he deny the effect, let the oath relate to the *object*.—It is to be observed that (according to *Haneefa* and *Mohammed*) the oath must in every instance relate to the *object*, where the cause is of such a nature as renders it liable to be done away by some other cause; excepting only where, in resting the oath upon the *object*, the tenderness due to the plaintiff is likely to be destroyed; for, in this case, the oath (according to all our doctors) must be rested upon the *cause*. Thus, if a wife, having been completely divorced, should prefer a claim of maintenance against her husband, and the husband should not think himself bound to comply, because of his being of the sect of *Shafei*,—or, if a proprietor of a house, or of land, should prefer a claim of pre-emption against the purchaser of a contiguous property on a plea of *Shaffa*, and the purchaser, being of the sect of *Shafei*, should not admit his claim,—in these cases (according to all our doctors) the oath ought to relate to the *cause*;—for, although the defendant could not deny, upon oath, the *cause* or *circumstances* of the case, still he might, upon oath, deny the *object*;—in other words, he might deny the validity of the claim as founded upon these circumstances: if, therefore, the oath were to relate to the *object*, it would evidently be injurious to the plaintiff.—If, on the other hand, the cause be of such a nature as cannot be removed or done away by some other cause, in that case the defendant's oath (according to all our doctors) must relate to the *cause*.—Thus, if a *Mussulman* slave should plead his having

been emancipated, and his master deny this, in that case (as the LAW does not admit of a *Mussulman* becoming a slave after having been once free) the oath tendered to the master must relate to the *cause*;—in other words, he must be required positively to swear “whether he “has ever emancipated this slave, or not?”—It is otherwise, however, with respect to a *female Mussulman* slave, or an *infidel male* slave; because both of these may be again subjected to slavery after having been rendered free;—the female slave, by being first emancipated, and then apostatizing and being united to a hostile country;—and the male slave, by being first emancipated, and then breaking his contract of fealty, and being united to a hostile country.

In a case of inheritance, the oath of the defendant must relate to his knowledge.

If a person acquire a right to a slave by inheritance, and another prefer a claim of right to the said slave, in that case the oath of the defendant must relate to his *knowledge*;—that is, he must be required to swear that he does not know the slave in question to be the property of the plaintiff;—because not being acquainted with the acts of the person from whom the inheritance descends, he cannot absolutely swear that the slave is not the property of the plaintiff;—whereas, if he had acquired the slave by a *gift* or *purchase*, he could swear positively as to his right of property, since *purchase* and *gift* are both causes of a right of property.

When a defendant enters into a composition with the plaintiff, an oath cannot afterwards be exacted from him.

If a person prefer a claim against another, and the defendant deny it, but should afterwards give the plaintiff ten *dirms*, either as an expiation for his oath, or as a composition for it, such expiation or composition is valid; because it has been so related by *Omar*; and the plaintiff cannot afterwards demand an oath from the defendant, as having himself destroyed this right.

CHAP. III.

Tahálif; or the swearing of both the *Plaintiff* and the *Defendant*.

IF a seller and purchaser should disagree, the purchaser asserting that the price of the goods was an *hundred dirms*, and the seller, that it was *more*,—or, if the seller should acknowledge the *article sold* to be *so much*, and the purchaser assert that it was *more*,—in this case, if either of them adduce evidence in support of his assertion, the *Kázee* must pass a decree in his favour; because attestation is stronger than simple assertion.—If, on the other hand, both of them should adduce evidence in support of their respective assertions, then the evidence of the party that attests most must be admitted; because the object of evidence is *proof*; and with respect to the *excess*, there is no opposition of evidence.—If the seller and purchaser should disagree with respect both to the *price* and the *goods*, then the evidence of the seller with respect to the *price* is preferable; and the evidence of the purchaser is preferable with respect to the *goods*. If, however, both parties be destitute of evidence, then the *Kázee* must say to the purchaser “if you acquiesce in the price claimed by the seller, it is well; if not, I will dissolve the contract;”—and to the seller, “if you are contented to yield the quantity of goods claimed by the purchaser, it is well; if not, I will dissolve the contract;”—because the object is to terminate the contention; and it is probable that his thus addressing them may terminate the contention, since the parties may possibly be averse to breaking off the contract; when, therefore, they perceive that if they do not agree, the contract will be broken, they may be

A seller and purchaser are mutually to swear where they both disagree, and are destitute of evidence.

content to make up their difference.—If, nevertheless, they should not even then agree, the *Kāzee* must make each of them swear to his denial of the claim of the other.—This mutual swearing, before seizing of the article of sale, is conformable to analogy; because the seller demands a large price, which the purchaser does not admit; whilst, on the other hand, the purchaser demands from the seller the delivery of the goods at the rate of purchase money he has paid, which the seller refuses to execute. Each, therefore, is a *defendant*; and hence an oath must be required from each.—After the delivery of the goods to the purchaser, indeed, the mutual swearing would be *contrary* to analogy; because the purchaser having received the goods has no further claim; and as there remains only the claim of the seller for the excess of the price, an oath can only be exacted from the *purchaser*, who is the *defendant*. It appears, however, from an infallible guide, that an oath must, in this case also, be exacted from each, because the prophet has said “ *Where a disagreement takes place between a buyer and seller, and the subject of the sale is extant and present, an oath must in that case be administered to each, and the purchaser must afterwards restore the goods to the seller, and the seller the price to the purchaser.* ” It is to be observed that where it is necessary to administer an oath to both parties, the purchaser must be first sworn.—This doctrine is conformable to the most recent opinion of the two disciples; and it is also agreeable to one report of *Haneefa*. It is also the most authentic doctrine; because the denial of the purchaser is of the greatest importance, since the price is first demanded from him; and also, because, in case of his refusal to take the oath, it would be attended with the immediate advantage of inducing the obligation upon him of the payment of the price;—whereas, if the *seller* were first sworn, it would nevertheless be necessary to defer the demand upon him of a delivery of the goods until he had received payment of the price.—If the parties should disagree in a sale of *goods for goods*, (that is to say, in a *barter*,) or of *price for price*, (that is, in a *Sirf sale*,) in this case the *Kāzee* is

at liberty either to swear the *seller* or the *purchaser* first; because in such a case the seller and purchaser are both upon an equal footing.

THE nature of the oath, in a disagreement between buyer and seller, is this.—The seller swears “by God, I have not sold the thing in question for a thousand *dirms*;” and the purchaser swears “by God, I have not bought it for two thousand *dirms*.” *Mohammed*, in the *Zecadât*, has said, “let the seller swear by God, I have not sold it for ONE thousand DIRMS, but for TWO thousand;—and let the purchaser swear, by God, I have not bought it for TWO thousand DIRMS, but for ONE thousand.”—In other words, the negation and affirmation ought to be coupled together for the greater caution.—The most authentic doctrine, however, is that an oath of *negation* is sufficient; because oaths proceed upon denial, as appears from the tradition concerning *Kissâmit**; for it is related that the prophet desired the people of *Kissâmit* to swear that “by God, they had not committed the murder, and did not know the murderer.”

Formula of the oaths of a seller and purchaser.

IF the seller and purchaser, in a disagreement, should both take an oath, the *Kâzee* must in that case dissolve the sale.—This is the adjudication of *Mohammed*: and it evinces that the sale is not of itself dissolved by the mutual swearing of the parties; because, as the plea of neither party is established, a sale continues of an undefined nature; and hence the *Kâzee* must dissolve it, as well to terminate their contention, as because that, where the price is not established, a sale remains without a *return*; and this being an invalid sale must consequently be dissolved, since it is indispensably requisite that all invalid sales be dissolved.

Where both parties swear, the sale must be dissolved, by an order of the *Kâzee*.

* The name of some Arabian district or tribe, where probably one of the prophet's followers was murdered.

A seller or purchaser, upon declining to swear, loses his cause.

If, in a disagreement between a purchaser and a seller, one of the two decline swearing, the claim of the other is in that case established against him; because by such refusal the party concedes to the other the article claimed by him;—for as his plea is thus rendered incapable of controverting the plea of the other, it follows that he accedes to that plea.

The parties are not to be sworn where their disagreement relates to something not essential to their contract.

If the parties should disagree with respect to the period fixed for the payment of the price, or with respect to the option of determination, or with respect to a partial payment that may have been made of the price,—in none of these cases are the parties to be sworn, because the disagreement, in this instance, relates to something not within the original scope of the contract. This disagreement, therefore, resembles a disagreement with respect to an abatement or remission of the price;—in other words, if a seller and purchaser should disagree with regard to a remission of part or the whole of the price, they would not in that case be sworn; and so also in the case in question.—The reason for what is here advanced is that the disagreement, in all of the supposed cases, relates to a thing which, if annihilated or done away, would not affect the existence of the contract of sale.—It is otherwise, however, where the disagreement relates to the *species* of the price,—(such as whether it is to consist of *dirms* of *Bokhara* or of *Bagdad*,)—or with respect to the *genus* of it, (such as whether it is to consist of *dirms* or of *deenârs*,) for such a disagreement is the same as if it related to the *amount* of the price,—in which case oaths are administered, for this reason, that the *genus* and *species* of the price are inseparable from the *substance* of it; because the price is a debt due by the purchaser; and a debt is only to be known and ascertained by a definition of its *genus* and *species*. The period fixed for the payment of the price, on the contrary, is not of this nature, as it is not a *species* of it, whence it is that the price continues extant and firm after the promised time of payment has elapsed.

IF a disagreement take place between a seller and purchaser with respect to the *condition of option*, or the period of payment, the assertion of the respondent* supported by an oath, must be credited; because optional conditions, and extensions of the period of payment, are *accidents* in a sale†; and with regard to *accidents*, the assertion of the *respondent* must be credited in preference.

In disputes respecting any super-added stipulation, the assertion of the respondent must be credited.

IF, after the destruction of the subject of a sale, in the hands of the purchaser, a disagreement should take place between the purchaser and the seller respecting the amount of the price, the parties, in that case, (according to *Haneefa* and *Abou Yoosaf*,) are not to be sworn, but the assertion of the purchaser must be credited.—*Mohammed* alleges that, in this case, the parties must be both sworn, and afterwards the sale dissolved, in return for the value of the subject of it which had been destroyed;—that is to say, the purchaser must pay the value of the goods to the seller, who must return to the purchaser the price of them.—Such, also, is the doctrine of *Shafei*.—The same difference of opinion obtains in cases where the subject of the sale has been removed from the property of the purchaser by *gift* or the like, or where it is in such a condition as would preclude the return of it in case of a *defect*.—The reasoning of *Mohammed* and *Shafei*, in support of their opinions, is that each party pleads the existence of a contract, different from what is claimed by the other; and each of them, consequently, denies the assertion of the other.

The parties are not to be sworn, where the goods perish in the hands of the purchaser.

OBJECTION.—The advantage of administering an oath to each of the parties is that the sale is thereby dissolved, and the goods returned by the purchaser to the seller, and the price by the seller to the purchaser.—Now this object cannot be obtained after the destruction of the subject of the sale, and therefore there can be no advantage in

* Arab. *Munkir*.—meaning, the person who denies.

† That is, are superadded to the contract.

the doctrine of *Mohammed*, of swearing both parties under such circumstances.

REPLY.—The advantage is that it relieves the purchaser from the excess of the price, in case the seller should refuse to take an oath,—as, in the same manner, it obliges the purchaser to pay such excess, in case he himself should refuse to take an oath.

—They must therefore both be sworn, in the same manner as when, after the destruction of the subject of the sale, they disagree with regard to the genus of the price, (that is, whether it consist of *dirms* or *deenars*;) and after swearing, the purchaser must give the value of the goods to the seller, and the seller must return the price to the purchaser. The arguments of *Haneefa* and *Abou Yoosaf*, in support of their doctrine upon this point, are twofold.—FIRST, the swearing of both parties, after delivery of the goods, is repugnant to analogy; because the purchaser has, in this case, received whole and complete the thing which he claims: the swearing of both parties, moreover, is ordained by the LAW in cases only where the subject of the sale is *extant* and *complete*, to the end that the sale may be dissolved; but this cannot be conceived in a case where the subject of the sale has perished; swearing the parties, therefore, after a destruction of the property, is not that *mutual swearing* expressed in the LAW.—SECONDLY, in the case in question the *object* of the sale (namely, the complete acquisition of the goods by the purchaser) is obtained; and after the completion of the *object*, a disagreement with respect to the *instrument* (that is, the *contract of sale*) is of no importance.—Moreover, the advantage set forth by *Mohammed* is of no account; since no advantages are attended to excepting such as are occasioned by the contract of sale; and the advantage in question is not occasioned by the contract.—All that is here advanced proceeds on a supposition that the price is a *money-debt*.—If, however, it consist of any specific article, such as *cloth* for instance, both the parties are to be sworn, according to all our doctors; because, in this case, a subject of sale still exists, (since the price, where it consists of any thing specific, may be considered as the subject;) and upon

upon both parties swearing, the sale must be dissolved; and the seller must return the price to the purchaser; and the purchaser must give a similar in lieu of the subject of the sale to the seller, provided it was of that kind of thing compensable by similars; or, if otherwise, he must pay the *value*.

If a person purchase two slaves by one contract, and one of them be afterwards destroyed, and a dispute arise betwixt the parties concerning the amount of the price, the seller asserting that it was *two* thousand *dirms*, and the purchaser asserting that it was *one* thousand, in this case (according to *Haneefa*) the parties are not to be sworn; on the contrary, the assertion of the *purchaser* must be credited. This, however, proceeds on the supposition of the seller being unwilling to receive the price of the *living* slave only, and to relinquish the price of the slave that is *dead*.—In the *Jama Sagbeer* it is related that, according to *Haneefa*, the assertion of the purchaser is to be credited, unless the seller be willing to accept of the price of the *living* slave only.—*Abou Yoosaf* alleges that both parties must be sworn with regard to the *living* slave;—that the sale, so far as relates to him, must be dissolved;—that the assertion of the purchaser must be credited with respect to the *dead* slave;—and that, therefore, the purchaser is responsible for the proportion of the *dead* slave, and not for the *whole* price.—*Mohammed*, on the other hand, maintains that both parties must be sworn with regard to *both* slaves; and that afterwards the purchaser must return the living slave and the value of the dead one; because, as (in his opinion) the destruction of *the whole* subject of sale does not prevent the swearing of both parties, it follows that the destruction of *a part* only does not prevent it, *a fortiori*.—The reasoning of *Abou Yoosaf* is that as the obstacle to the swearing of both is grounded only on the destruction of the subject of the sale, it ought of course to operate only in the degree in which it may have been destroyed.—The reasoning of *Haneefa* is that the swearing of both parties, although repugnant to analogy, is yet established by the LAW,

Case of a dispute concerning the price of two slaves, where one of them dies.

in cases where the subject of the sale still completely exists: but where a part of the subject is destroyed, it does *not* completely exist; because the *complete* existence of it supposes the existence of *the whole*; and the *whole* cannot exist but by the preservation of all its parts.—If, on the other hand, both parties should swear with respect to the *living* slave only, it is evident that this cannot be effected, but by a reference to his particular value.—Now as both slaves are included under one price, the particular value of each cannot be known but by conjecture; and hence it appears that the swearing of both parties, under such circumstances, must be referred to something *uncertain*; and this is illegal.—If, however, the seller be willing to relinquish his right to the destroyed slave, and to consider him as having never existed, both parties may, in that case, be sworn as to their denial of the claim of the other, respecting the whole price of both the slaves; because the whole of the price is then opposed to the living slave, from the concession of the seller to take the *living* slave only in lieu of the whole of the price, and to consider the *dead* slave as excluded from the contract.—What is here advanced is agreeable to the exposition of several of our modern doctors. They have also explained the meaning of the sentence, in the *Jama Sagbeer*, to be that the seller shall not absolutely receive *any* thing for the dead slave; and they have connected the exception with the omission of swearing of the parties.—Others of our modern expositors, however, have explained it to mean that the seller shall agree to take, as the price of the *dead* slave only, what the buyer may acknowledge, and nothing more; and they have connected the exception with the non-swearing of the *buyer* only.—Thus they have explained it to mean that the seller may take the *living* slave, without the necessity of the purchaser's taking an oath, provided he be willing to take, for the dead slave, what the purchaser may of himself acknowledge to have been his value.—The mode of swearing the parties, in this instance, (according to *Mohammed*,) is the same as in a case of non-existence of the subject of the sale.—If, therefore, both take an oath, and differ in their assertions,—and if one or both should

Mode of
swearing the
parties in this
instance.

require the dissolution of the contract, the *Kázee* must, in that case, dissolve it, and command the purchaser to return the living slave, and the value of the dead one; and, in the determination of the value of the dead slave, the purchaser's assertion must be credited.—There is, however, a difference of opinion among our modern commentators, in their exposition of the doctrine of *Abou Yoosaf*, with respect to the mode of swearing the parties, in this instance.—The most approved mode is, to tender an oath to the purchaser that “he had not purchased those two slaves for the price claimed by the seller;”—and in case of his refusal to take the oath, to confirm the claim of the seller: but if he swear accordingly, an oath must then be tendered to the seller, that “he did not sell these two slaves for the price claimed by the purchaser;” and if he should refuse to take it, the claim of the purchaser must be confirmed: but if he swear accordingly, the sale (so far as it relates to the *living* slave) must then be dissolved, and the purchaser must be responsible for the price of the *living* slave.—In proportioning the respective prices of the two slaves, regard must be had to the value they bore on the day in which the purchaser took possession of them. If the parties should disagree as to the value the *dead* slave bore on the day of delivery, the bare assertion of the *seller* is to be credited in preference to that of the *purchaser*. If, however, either of the parties produce evidence, it must be admitted in preference to the other's assertion; and if both should produce evidence, that of the *seller* must be admitted.—This is agreeable to the analogy set forth and exemplified in a case recited in the *Mabsoot*; and which is as follows.—If a person, having purchased two slaves by one contract, and taken possession of them both, should afterwards return one of them on account of a *defect*, and the other should then die in his possession, in that case he must pay the price of the slave that died; and he becomes exempted from the price of the other that he returned:—and, in proportioning their respective prices, regard must be had to the value of each on the day in which the purchaser obtained possession of them.—If the parties should disagree concerning the value of the *dead* slave, the

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assertion

assertion of the seller must be credited, as he is the *defendant* or *respondent*, since both parties admit that a price is due, and the purchaser, proceeding on his assertion of the inferior value of the slave that is dead, pleads that he has only a *small* sum to pay, which the *seller*, asserting the superior value of the dead slave, *denies*.—If both parties adduce evidence, the evidence of the *seller* must be credited, as it proves most, since it proves the superior value of the dead slave.—The reason of this is that, in oaths, regard is had to the *reality*; because, as the oath of each opposes that of the other, and as they both know the real state of the case, it follows that the foundation of the oath rests upon the real state of the case; and as the seller is the *real* defendant, his oath must therefore be credited. In *evidence*, on the other hand, regard is had to *appearance*; because, as the witnesses are not acquainted with the *real* state of the case, with respect to them, that must be credited which is *apparent*; and the seller is apparently the *plaintiff* in this instance, since he claims a greater quantity of price for the dead slave. The evidence, therefore, produced by him must also be admitted in preference, since it has a superiority, because of its excess of probability.—From this explanation we may collect the principle on which *Abou Yoosaf* has grounded his doctrine, that “the assertion of the seller is to be admitted with respect to the amount of the price of the dead slave, and the evidence adduced by him must be preferred, in case of the parties continuing to disagree with respect to the price of the said slave after they have both been sworn.”

Case of a disagreement concerning the price, in the dissolution of a contract of sale, after delivery of the subject of it.

If a person purchase a female slave, and take possession of her, and the parties afterwards agree to dissolve the sale, but disagree concerning the price, in this case they must be both sworn; and after the swearing of them both, the original sale reverts, and the dissolution becomes void.—It is to be observed that the swearing of both parties, in the dissolution of a sale, is not founded on the sacred writings, since the ordinance there respects a case of *absolute sale*, and *sale* ceases

to

to exist, in case of a dissolution; for the dissolution is a *breaking off* of the sale with respect to the parties.—The swearing of the parties, therefore, in this instance, proceeds upon analogy; because the example under consideration proceeds upon a supposition of the seller not having received back the article after the dissolution, in which case the swearing of the parties is not *repugnant* to analogy, but rather *agreeable* to it.—It is on this ground that we determine upon a case of *hire*, from its analogy to a case of *sale before seizure*; (as where, for instance, a *lessor* and *lessee* disagree with regard to the object of their contract, prior to the expiration of the lease;—in which case both parties are sworn, because of the analogy this bears to a case of sale, prior to the receipt of the goods by the purchaser:)—and also, that we determine with respect to the *heir* of a contracting party from the analogy his situation bears to that of the contracting party himself; (as where the heir of a *purchaser* and the heir of a *seller* disagree,—in which case they must both be sworn, in the same manner as the *purchaser* and the *seller* would have been.)—It is upon the same ground, also, that we determine the *value* of an article to be analogous to the *substance* of it, in case of the destruction of the subject of the sale whilst in the possession of the seller by some other person than the purchaser; (as where, for instance, another person *kills* the subject of the sale*, whilst yet in the hands of the seller, delivery not having been made to the purchaser;—in which case the slayer must pay the *value*, which then stands as a substitute for the *substance* of the article sold;)—whence, if the seller and the purchaser disagree concerning the price, they must both be sworn, and the sale dissolved; and the *value* of the slave given to the seller; in the same manner as the *substance* would have been given, had it been extant.—It is to be observed, however, that if the seller receive the goods after a dissolution of the contract, and the parties then disagree concerning the price, they are not to be sworn, according to *Haneefa* and *Aboo Yoofoof*.—*Mohammed* maintains

* Supposing it to consist of a slave or animal.

that in this case also a *Tabálif*, or mutual oath, is tendered to the parties; because here also (according to his tenets) the swearing is agreeable to analogy.

Where the price has been paid in advance, and the parties agree to dissolve the contract, but disagree concerning the sum advanced, the assertion of the seller must be credited.

If a person sell a *Koor** of wheat, by a *Sillim* contract, for ten *dirms*, and the parties afterwards agree to a dissolution of the contract of *Sillim*, but disagree concerning the price, in this case the assertion of the seller who has received the advance† must be credited: and the *Sillim* contract does not in this instance revert, the dissolution still continuing in force; because *dissolution*, in a case of *Sillim* sale, is not merely a *breach* of the contract, but an *abrogation* of it, whence the *Sillim* contract cannot revert; (contrary to a dissolution of a simple contract of *sale*.)—Hence, if the price advanced consist of goods, and the person who has received the advance wish to return them to the purchaser on account of a defect, and the *Kázee* pass a decree to that effect, with the consent of both parties,—in that case, if the goods be destroyed prior to the return of them to the purchaser, the contract of *Sillim* does not revert. A contract of *actual sale* would however revert under such circumstances: and this case plainly shews that there is a difference between contracts of *sale* and contracts of *Sillim*.

Cases of disagreement between a husband and wife respecting the dower.

If a husband and wife disagree concerning the *dower* or *marriage settlement*, the husband asserting that it was *one* thousand *dirms*, and the wife that it was *two* thousand, in this case the party that brings evidence must be credited, as this establishes the plea of that party upon *proof*: and if *both* bring evidence, that adduced by the *woman* must be preferred, as it proves most.—This is where the woman's *Mibr Misl*, or *proportionable dower*, falls short of what she claims.—

* About 7,100lb. weight, or twelve camel-loads.

† Arab. *Mooslim-ali-bee*, meaning the *seller*, or person to whom the price has been advanced.

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If, however, neither of the parties produce evidence; they are to be sworn, (according to *Haneefa*;) but the contract is not dissolved; because the only effect of the swearing, in this instance, is that it annuls the *bargain* with respect to the dower, in the same manner as if no bargain had ever existed; but this does not engender any doubt with respect to the *marriage itself*, since the dower is not an *essential*, but merely a *dependant* of the marriage*.—It is otherwise in a case of *sale*, for there the annulment of the bargain, with respect to the price, destroys the contract, (as was before observed,) and the sale is consequently dissolved.—In the case in question, after the parties swearing, a *proportionable* dower must be adjudged to the woman.—If, on the other hand, the woman's proportionable dower, and the sum acknowledged by the husband, be *equal*, or if her proportionable dower *fall short* of what he acknowledges, the *Kázee* must, in that case, pass a decree in favour of the husband, as apparent circumstances are on his side.—If the wife's proportionable dower be equal to what she claims, or if it *exceed* her claim, the *Kázee* must, in that case, pass a decree in favour of her claim.—If the proportionable dower be *greater* than what is acknowledged by the husband, and *less* than what is claimed by the wife, the *Kázee* must, in that case, adjudge a proportionable dower to the wife; because, after the swearing of both parties, nothing is established either *greater* or *less* than the *proportionable* dower, which is therefore a *mean*.—The compiler of the *Hedāya* observes that the doctrine here advanced, of *first* swearing both parties, and *then* adjudging the *proportionable* dower, is the doctrine of *Koorokbee*: and it proceeds on this principle, that under the existence of a *stipulated* dower, no attention is paid to a *proper* or *proportionable* dower;—and as the mutual swearing of the parties is the means by which that is to be set aside, the oaths are therefore tendered to the parties, in the *first* instance, in all the above cases; that is, whether the *proportionable* dower be *equal* to, or *greater* than, the claim of the wife;

* See vol. I. p. 122.

or whether it be *equal* to, or *less* than, that of the *husband*.—In the opinion of *Haneefa* and *Mohammed*, the oath is first to be administered to the husband, in order that the advantage arising from his declining to swear may be quickly obtained; for, as it is his business first to advance the dower, he must be first sworn,—in the same manner as, in a case of seller and purchaser, the purchaser is first sworn.—The exposition of *Râzee* is, however, different; but as that, as well as the disagreement of *Abou Yoozaf*, have been particularly explained under the head of *marriage*, it is not necessary to repeat them.

If a husband and wife disagree concerning the dower,—the husband asserting that he had agreed to give a particular *male* slave, and the wife asserting that he had assigned a particular *female* slave,—in this case the rule holds the same as in that immediately preceding; that is, if the woman's *proper* dower be equal to, or greater than, the value of the *male* slave, the *Kâzee* must adjudge in favour of the *husband*; but if it be *equal* to, or *greater* than, the value of the *female* slave, the *Kâzee* must decree in favour of the *wife*.—The only difference between this case and the preceding, is that if the female slave and proportionable dower be equal in point of value, the wife is, in that case, entitled to the *value*, and not to the *slave substantially*; because she cannot possess the slave without the consent of her husband, which she is not, in this instance, supposed to have obtained.

Case of a dispute between a *lessor* and *lessee*, concerning the rent, or the extent of the lease, *before* delivery of the subject.

If a *lessor* and *lessee*, before enjoyment of the object of the contract, (that is, before the *usufruct* of it,) disagree concerning the amount of the *rent*, or the extent of the *lease*, they must in that case be both sworn; and after swearing, the contract must be dissolved, and each party must return to the other whatever he may have received.—The reason of this is that the swearing of both parties, with regard to *sale*, in case of a disagreement prior to the purchaser's seizure of the goods, is conformable to analogy, as has been already demonstrated.—Now a lease

lease prior to the enjoyment of the usufruct, is similar to a sale prior to seizure of the subject: (and such is the case here considered.)—If, therefore, the parties disagree concerning the *amount of the rent*, the oath must be first administered to the *lessee*, as he denies the obligation of the *rent*.—If, on the other hand, they disagree concerning the extent of the subject of the lease, the oath must be first administered to the *lessor*.—If either of them refuse to take the oath, the claim of the other is thereby established.—If one of them produce evidence, *his* claim is established; but if *both* bring evidence, that adduced by the *lessor* must be preferred, in case of the disagreement relating to the quantity of the rent; and that of the *lessee*, in case of its relating to the extent of the lease.—If they disagree in *both* points, the evidence of each is in that case to be credited, in the excess which it may prove.—For instance; the lessor claims the lease to have been made for a period of *one month*, in exchange for *ten dirms*, and the lessee claims a period of *two months* in exchange for *five dirms*; in which case the *Kâzee* must adjudge it to be for a period of two months in exchange for *five dirms*.

If a lessor and lessee disagree, *after* the receipt of the object of the lease, the parties are not to be sworn, but the assertion of the *lessee* must be credited, according to all our doctors:—according to *Haneefa* and *Abao Yoofoof*, evidently, because (in their opinion) the destruction of the object of the contract is a bar to the swearing of the parties:—and, in the same manner, according to *Mohammed*, because his tenet, that the destruction of the object is not a bar to the swearing of both parties, relates only to the object of a *sale*, and is founded on a principle that the object of a sale may be considered as *price*, and the swearing of both parties (that is, of the buyer and the seller) is with relation to the *price*;—if, therefore, the rule of swearing *both* parties were admitted in the case in question, and the contract were afterwards to be annulled, it must necessarily follow that the object of the lease could not be considered as *price*; because the object of the lease is

Case of the same nature, after delivery of the subject.

usufruct or *advantage*; and advantage is not in itself *præ*, and cannot be considered as such but from the contract; and, in the case in question, it becomes evident that there is no contract.—Now since in this case it is impracticable to swear both parties, the assertion of the lessee is therefore credited, as he is the defendant and denier.—If, on the other hand, the lessor and lessee dispute after the receipt of *part* of the object of the lease, they must be both sworn, and the contract dissolved with regard to what remains.—With respect to what is *past*, in this instance, the assertion of the *lessor* must be credited; because a lease is contracted anew *every moment*, in proportion to the progress of the usufruct.—Thus a new contract is opposed to every individual particle of advantage or usufruct.—It is otherwise in a case of *sale*, as a contract of sale is opposed to the whole of the subject of it; for which reason a sale, whenever it becomes obstructed or impracticable in *part*, is held to be impracticable in the *whole*.

Case of a dispute concerning ransom.

If a master and his *Mokâtib* disagree concerning the amount of the ransom, according to *Haneefa* they must not be sworn.—The two disciples are of opinion that they must be sworn, and that the contract of *Kitâbat* must be afterwards dissolved; (and such also is the opinion of *Shafei*;) because the contract of *Kitâbat* is a contract of *mutual exchange*, and is capable of dissolution:—the case in question, therefore, resembles a case of *sale*, since the master claims an excess of ransom, which the *Mokâtib* denies; whilst, on the other hand, the *Mokâtib* claims his title to freedom, on his payment of the ransom agreeable to his settlement of it; and this the master denies:—they are both, therefore, in some measure plaintiffs, and also both defendants, as in a case of sale; and hence they must both be sworn, in the same manner as a purchaser and seller are both sworn when they differ concerning the price.—The argument of *Haneefa* is that the ransom is opposed to the removal of a restriction, which operates instantaneously with respect to the slave; but that it is not considered as opposed to the *freedom* until the *Mokâtib* actually pay it.—Nothing remains,

mains, therefore, but a disagreement with respect to the amount of the *ransom*; and with respect to *that* the master is a *plaintiff* only, and the *Mokâtib* only a *defendant*, (the *plea* and the *defence* not existing alike in *both* parties, as in some of the cases before recited:)—the parties, therefore, are not sworn; but the assertion of the *Mokâtib*, upon oath, must be credited.

If a husband and wife disagree concerning any article of furniture, each claiming a right in it, in that case, if the furniture in question be particularly adapted to the use of *men*, it is adjudged to the *husband*; and if particularly adapted for the use of *women*, is adjudged to the *wife*; because, in the *former* instance, probability is an argument in favour of the *husband*; and in the *latter*, in favour of the *wife*. If, however, the article be of such a nature as is common to the service of *both*, (such as a *pot*, or other vessel,) it is in that case adjudged to the *husband*; because the wife herself, and every thing belonging to her, is in the possession of the husband; and, in *claims*, the assertion of the *possessor* is preferred. This rule, indeed, does not hold good where the article in dispute is peculiarly adapted to the service of *women*; for, although such articles also are in the possession of the husband, yet the probability of their being the property of the *wife*, from the particular nature of them, is stronger than the argument derived from possession, and therefore supercedes it.—What is here advanced proceeds upon a supposition of the actual existence of the marriage; or of a separation between the parties, in which case the law is exactly the same.—If, on the other hand, one of the parties should die, and the heirs of the deceased enter into a contention with the survivor concerning the family goods, in that case the goods in question are adjudged to the survivor, whether they be of a nature adapted to the service of a man or woman; since possession is clearly established in favour of the *living* party.—This is according to *Haneefa*.—*Abou Yoosaf* maintains that every thing which partakes of the nature of *parapher-*

In a dispute between a husband and wife concerning furniture, the article in dispute is adjudged to the party to whose use it is adapted.

If the dispute be between the survivor and the heirs of the deceased, the article must be adjudged to the survivor.

nalha *, whether it be restricted to the use of a *man* or *woman*, must be adjudged to the *wife*; and that all the rest must be adjudged to the husband upon his swearing to the property;—because, as every woman is supposed to have brought a paraphernalia along with her, there is a probability that the specified articles may have been included in it; and this probability destroys the argument in favour of the husband from possession; but with respect to the rest of the family goods, the husband's claim, from possession, holds good, as there is nothing preventive or destructive of it.—*Mohammed* alleges that whatever is only fit for the use of a *man* ought to be adjudged to the *husband*; that whatever is only fit for *women* ought to be adjudged to the *wife*; and, that whatever is, in point of use, common to *both*, ought to be adjudged to the husband or his heirs, for the reason alleged by *Haneefa*. If, in the case in question, one of the parties be a slave, and the contention concerning the property happen during the life of *both*, it must be adjudged in favour of the party who is free; because the seizure of a free person is in a superior degree valid;—but in case of the death of either, it must be adjudged to the *living* party, as the possession of the deceased exists no longer, and the possession of the living then remains unopposed.—This is according to *Haneefa*.—The two disciples maintain that a privileged slave and a *Mokarib* are equivalent to *freemen* in this point, as their possession is valid in contested cases.

If one of the parties be a slave, it must be adjudged to the party who is free.

* Arab. *Jaher*.—Meaning vestments or furniture of any kind which a bride brings to her husband's house.

SECTION.

Of PERSONS who are not liable to CLAIMS.

If a defendant plead that "a certain absent person had deposited with him the article in dispute," or "had pledged it to him," or that "he himself had usurped it from a particular absent person," and bring witnesses to prove his allegation, in that case no room for suit or contention exists between him and the plaintiff; and so also, if he plead that "a certain absent person had let the said thing to him in lease," and produce evidence in proof of it;—because in all these cases it is clearly established by the evidence of the witnesses of the defendant that his *tenure* is not the subject of contention, since he is seized of the thing in the manner of a *trust*.—*Ibn Shabirma* maintains that the defendant is not exonerated from the suit in consequence of proving, by witnesses, the deposit, the pledge, the usurpation, or the lease; because the proof of the absentee's right of property is impracticable, since there is no person in his behalf to appear as a party in the suit; and the exonerated of the defendant from the suit of the plaintiff depends on the proof of the absentee's right of property.—Our doctors, on the other hand, argue that the evidence here adduced has two objects in view:—FIRST, the establishment of *the absentee's right of property*, concerning which there is no suitor on his behalf; and which consequently cannot be proved:—SECONDLY, a repulsion of the claim of the plaintiff; and as he is the immediate adversary in this concern, the repulsion is consequently established.—The plaintiff in this instance, therefore, resembles a person commissioned by a husband to remove his wife:—that is to say, if a person appoint another his agent for the removing and conducting of his wife to him, and the wife prove, by witnesses, that her husband had divorced her, in this case

A person is not liable to a claim, who sets up a plea of deposit, pledge, or usurpation, (in the article claimed,) supported by the testimony of witnesses, unless he be a person of notoriously bad character.

case the testimony of these witnesses must be admitted; merely so far, however, as to restrain the removal of her by the agent; but not with respect to the establishment of the proof of the divorce; (as was formerly mentioned *;) and so also in the case in question.—It is to be observed that the defendant, in this case, is not exonerated from the claim of the plaintiff upon his bare *allegation* of the deposit of the absentee, or of his pawn, &c. nor until he produce evidence in support of his assertion; because the defendant is himself apparently an *adversary*†, in contemplation of his being possessed of the subject of the claim; and is opposed by the suit of the *plaintiff*, which he means to repel by the declaration above mentioned;—his declaration, therefore, cannot be admitted, unless he adduce evidence in support of it; in the same manner as where a person says to his creditor “I have transferred the debt I owe you upon another person,” in which case his assertion is not believed unless supported by evidence.—*Ibn Abce Leilee* is of opinion that the defendant is exempted from the plea, immediately upon his assertion.—The *last* recorded opinion of *Abao Yoosaf* is that if the defendant be virtuous and not noted for fraud, the rule obtains as above laid down.—If, however, he be noted for fraud, he in that case is not exonerated from the claim, even on producing evidence in support of his allegation; for a fraudulent person sometimes gives property that he has usurped to a traveller (for instance) in order that the traveller may afterwards, in the presence of witnesses, resign it to him in *trust*; and this he does with a view of defrauding the original proprietor of his right.—Where the defendant, therefore, is open to a suspicion of such frauds as these, the *Kāzee* must not accept of his evidence.—If the defendant’s witnesses should say “a person whom we do not know did resign this article to him in trust;” in that case the defendant is not released from the suit, for two reasons.—FIRST, there is a possibility that that person may be the *plaintiff himself*.—

or, that his witnesses bear defective testimony.

* Under the head of *Divorce*.

† That is, he may himself be regarded (in one view) in the light of a *plaintiff*.

SECONDLY,

SECONDLY, If they had specified the person, the plaintiff would then have had it in his power to have traced him, and to have entered a suit against him; but as they have not specified him, he is deprived of the power of tracing him; and if, under such circumstances, the defendant were released from the claim, an injury is thereby occasioned to the plaintiff.—If, again, the witnesses should say “we know the face of the man in question, but we are ignorant of his name and family,” in that case the same rule obtains, (according to *Mohammed*;) because of the *second* reason.—According to *Haneefa*, on the contrary, the defendant in this case is released from the claim, as having proved that the thing in question came to him from another in trust; since, as the witnesses know the countenance of the man, (contrary to the *preceding* case,) the defendant’s possession is consequently no longer a subject of litigation.—In reply, also, to what is urged by *Mohammed*, it may be observed that either the plaintiff has been himself the occasion of the injury he sustains, in forgetting the defendant; or, the injury has been occasioned by the witnesses of the defendant; but not by the defendant himself.—(This case is termed the *Makbamsa*, or *quinqual*, of the book of *pleas*; because it has given rise to five different opinions, as here stated.)

If a defendant plead that he had purchased the article in dispute from a certain absentee, he is in that case a party, and liable to answer to the claim of the plaintiff; for in declaring that he was seized of the thing in virtue of a *right of property*, he acknowledged himself to be subject to the suit of the plaintiff.

He is liable, if he set up a plea of *right of property*:

If, in a suit, the plaintiff should say to the defendant “you have *usurped* this thing from me,” or “you have *stolen* this thing from me,” in this case the defendant is not released from the claim, although he produce witnesses in proof of the article in question having been committed to him by an absentee in *trust*; because here the plaintiff asserts the action of usurpation or of theft against him, and in

or, if the plaintiff sue him on a plea of *theft*, or *usurpation*, although he produce evidence to prove a *trust*;

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this respect (and not because he is *seized of the property*) he is subject to the plea.—It is different where the plaintiff asserts absolutely his *right of property*; because in that case the defendant cannot be subjected to the claim otherwise than from his possession of the thing; whence it is that an absolute claim of property in an article is not admitted against any except the *actual possessor* of the article; whereas a plea for the act [of acquisition, such as *usurpation*, and so forth] lies against any other person.

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If, in a suit, the plaintiff should say to the defendant, who is seized of the thing in dispute, “this thing which is in your possession is my property, and has been taken from me by *theft*,” and the defendant say “a certain absentee deposited this thing with me;” and bring evidence to prove his assertion, still he is not released from the claim.—This is the opinion of *Haneefa* and *Aboo Yoosaf*; and proceeds upon a favourable construction of the law. *Mohammed* holds the defendant, in this case, to be exempted from the claim, as the plaintiff has not exhibited the claim of theft against *him*, but against an *unknown person*; and as a claim of this nature against an *unknown person* is nugatory, it follows that the claim, with respect to the *act*, cannot stand:—nothing, therefore, remains except a claim with respect to the *right of property*; and as, in a claim concerning a *right of property*, the suit is set aside, by the defendant proving the article in dispute to have been committed to him in *trust*, the case is therefore the same as if the plaintiff had declared the thing to have been taken from him by *usurpation*, without naming the usurper.—The reasoning of *Haneefa* and *Aboo Yoosaf* is that the mention of the *act* involves a plea against the *agent*; and the presumption is that the possessor is the agent, but that the plaintiff, from motives of tenderness, may not have specified him, in order to screen him from punishment. The case is, therefore, the same as if the plaintiff had said “you have stolen this thing.—It is otherwise where the plaintiff charges the defendant with *usurpation*, for in this case, although he make the charge

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in direct terms, still punishment is not incurred, notwithstanding it be evident that his design is to prove the usurpation.

If the plaintiff should say to the defendant "I have *bought* this thing from a certain person," and the defendant reply "that person consigned the thing to me in *trust*," in this case the defendant is exempted from the claim without the necessity of producing evidence; because both the plaintiff and the defendant are agreed that the thing is, originally, the property of another man; and consequently the tenure of the person seized of it is not a matter of dispute between them.—If, however, the plaintiff say that "a certain person had appointed him an agent for seizure of the said thing," and produce evidence in proof of this, he is entitled to prosecute his suit against the possessor, as having established, by witnesses, a superior right to the possession of the article in question.

but not if the plaintiff sue him on a plea of purchase.

CHAP. IV.

Of Things claimed by two Plaintiffs.

If two men separately claim the property of an article in the possession of another, and each bring evidence in support of his claim, the *Kázee* must, in that case, adjudge the article to be the joint property of both in an equal degree.—One opinion of *Shaf'ei*, in this case, is that, as the evidence respectively adduced by the parties is contradictory of each other, they must both be rejected.—Another opinion of his is that the *Kázee* ought to throw the die to determine to whom the property be-

If the claim be laid to a thing of a divisible nature, and the proofs on each part be equal, the thing must be adjudged equally between both claimants.

longs.—His reasoning in support of these opinions is that as it is an impossibility that two men can each have separately a complete right of property to one and the same thing, it follows that the evidence of *one* of the parties must be false; but as there is no criterion by which the truth can be determined, it is therefore proper either to reject *both*, or to have recourse to the die; more especially as the prophet in a similar case caused the die to be thrown, and gave judgment accordingly. The arguments of our doctors on this point are twofold. **FIRST**, a tradition reported by *Tameem Bin Tirsfa*, that the prophet, in a cause which was brought before him regarding a *camel*, in which both parties brought evidence in support of their claim, adjudged it to be the joint property of both: (for, with respect to the tradition quoted by *Shafei*, it alludes to a decision of the prophet in the infancy of the *Mussulman* religion, which was afterwards disapproved of.)—**SECONDLY**, it is possible to reconcile the evidence of *both* the parties, by supposing the evidence of the one party to allude to the *cause* of right of property in the possessor, and that of the other to the *right of possession*: and as, by this hypothesis, the evidence of each of the parties is reconcileable to truth, it is therefore incumbent to act according to it in the greatest possible degree,—namely, by adjudging *each* of them to have a right to the half of the property.

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adjudged ac-
cording to her
declaration:

or, (if the
witnesses spe-
cify *dates*)
according to
the prior
date.

IF two men, severally, claim marriage with one woman, and each adduce evidence in support of his claim, the *Kāzee* must not, in that case, pass a decree upon these evidences; because, as the subject of dispute does not admit of *divided* property, it is consequently impracticable to adjudge the half to each.—He must therefore have recourse to the declaration of the *wife*, and adjudge her in marriage to that party whose claim she verifies.—This, however, proceeds upon a supposition of the witnesses not having mentioned any date; for if they should specify *dates* to the marriage, the evidence of that party which specifies the most *ancient* date must be preferred.—If, on the other hand, previous to the adduction of evidence by either party,

party, the woman should make an acknowledgment in favour of one of the plaintiffs; she is adjudged to be the wife of the acknowledged:—but if the other party should afterwards produce evidence in support of his claim, the *Kázee* must adjudge her to be *his* wife, as *evidence* is stronger than *acknowledgment*.

If only *one* man claim marriage with a woman, and she deny it, and he produce evidence in support of his claim, and, the *Kázee* having in consequence passed a decree in his favour, another person then appear and claim his marriage with the same woman, in this case the *Kázee* must not reverse his decree; because, having been passed on good grounds, it cannot afterwards be affected by a circumstance of *equal*, and far less by one of *inferior* force.—If, however, the witnesses of the *second* plaintiff should attest the date of the marriage to have been *prior* to that mentioned by the witnesses of the *first* plaintiff, the evidence brought by the second plaintiff must in that case be preferred, as the error of the first witnesses has thereby been made apparent.—The law is the same in a case where a husband and wife living together, and their marriage being notorious, another person claims marriage with the woman, and brings evidence in support of his plea; for in this case his evidence is not admitted unless it prove a marriage *prior* to that of the husband with whom the wife then lives.

A decree adjudging a wife to a *single* claimant cannot be reversed in favour of a *subsequent* claimant, unless his witnesses prove a priority of date.

If two men severally claim a right of property in a slave in the possession of another, (as if each were to assert that he had *purchased* him from that other,) and each bring evidence in support of his claim, in that case, (as the *Kázee* must adjudge him to be the joint property of both,) they are severally at liberty either to take the half of the slave at the half of the price or relinquish the bargain.—The case is therefore the same as where two unauthorized persons sell the same article belonging to a *third* person to two different men, and the proprietor confirms both sales, in which case each purchaser is at liberty either to

Two claimants to a slave, on a plea of *purchase*, upon his being adjudged between them, are severally at liberty to pay half the price, or to relinquish the bargain:

take the half of the article for half the stipulated price, or to reject the sale entirely and receive back his money; because, as he had before assented to the bargain, on the supposition of its extending to the *whole* of the article, it cannot be inferred that he assented to the *partial* bargain; he is therefore at liberty either to accept or reject it as he pleases. If, however, in the case in question, after the *Kázee* adjudging the half to each, one of the parties should reject it, the other cannot take the *whole*, because that half was adjudged to the other in consequence of evidence he produced, and on his rejecting it the sale becomes, in that half, null and void.—It were otherwise, however, if one of the parties should intimate his rejection of the half *prior* to the adjudication of the *Kázee*, for in that case he would be entitled to take the whole, because his claim went to a right to the whole from purchase, and as the bar to his obtainment of the *whole* (namely, the *plea of the other*) is removed by the relinquishment of the co-plaintiff, prior to the virtual annulment of any part of the sale by the decree of the *Kázee*, he is consequently entitled to the whole of his claim. (Analogous to this is the resignation made, by one of two *Shafees*, of his right of pre-emption, prior to the determination of the *Kázee* in favour of *both*.—Analogous, also, to the *first* statement is that of the resignation made by one of two *Shafees* of his right of pre-emption *subsequent* to the decree of the *Kázee* in favour of both *.)—It is to be observed that if, in the case in question, the two plaintiffs should specify the *dates* of their purchase, the sale must be adjudged in favour of the prior purchaser; because it appears that he had established his right at a time when he had no opponent; and on this account the subsequent claim of the other is invalid.—If *one* of the parties should mention a date, and not the *other*, the sale must in that case be adjudged in favour of the one who specifies the date; because he clearly establishes his claim at a particular time; and as the other does not specify any period, it becomes, of consequence, doubtful whether he purchased it *prior* or *posterior* to

but if they
specify and
prove *dates*,
the slave must
be adjudged
to the prior
purchaser.

* This is fully explained under the article *Shaffa*.

the particular time mentioned by the other; and the *Kázee* (because of this doubt) cannot pass a decree in his favour.—If neither of the parties specify a date, and one of them be in possession of the thing, the claim of the *possessor* is preferable; because it is probable that his right of possession was derived from *prior purchase*; and also, because both of their claims being established in an equal degree, the possession, which is undisputed, cannot be affected by a matter of *doubt*. The same rule obtains when one of the plaintiffs is seized of the thing, and the witnesses of the other specify the date of his purchase.—But it is to be observed that if the witnesses should expressly attest *his* purchase to have been *prior* to that of the purchase of the *possessor*, the sale must in this case be adjudged in his favour; as a certain knowledge of prior purchase establishes a *positive* right, whereas possession establishes only an *implied* right.

If two men claim a particular article, one in virtue of *purchase*, and the other in virtue of *gift* and *seizin*, and each produce evidence in support of his claim, without, however, mentioning *dates*, in this case the evidence to the *purchase* must be admitted in preference; because *purchase* is stronger in its nature than *gift*, as it involves a mutual exchange; and also, because purchase is *in itself* a cause of a right of property; whereas the right of property in a *gift* rests upon the *acceptance*.—If the claim of the one be founded upon *purchase*, and that of the other upon *charity* and *seizin*, and all the other circumstances be the same as above stated, the same rule holds, because of the reasons aforesaid. If, however, the claim of one be founded upon *gift* and *seizin*, and that of the other upon *charity* and *seizin*, the *Kázee* must in this case decree the thing to be in an equal degree the joint property of both; seeing that their claims are equal, and that neither has a preference over the other.

OBJECTION.—A preference ought to be given to the claim of *charity* over that of *gift*; because a *gift* is not *binding*, since the giver

Where one party pleads *purchase*, and the other *gift* and *seizin*, (without specifying dates,) the article must be adjudged to the *purchaser*.

giver may *retract* the gift; whereas *charity* is binding, and cannot be retracted.

REPLY.—No preference is given excepting for some effect immediately operating; and the legality of retracting a gift, and the illegality of retracting charity, relate to the *future*; but at the moment they are on a foot of equality.—It is to be observed that this doctrine of the equality of claims of *gift* and of *charity*, and of the necessity for decreeing jointly to both, is when the thing in question is capable of division. But if the thing be incapable of division, there is a difference of opinion; some maintaining that the law in this case is the same; and others maintaining that the law in this case is different, as it induces a *gift* with respect to *indefinite* property, which is unlawful.

A claimant on a plea of *purchase*, and a claimant on a plea of *marriage*, are upon an equal footing.

IF two persons lay claim to the same thing, *one* of them in virtue of *purchase*, and the *other* (being a *woman*) in virtue of the possessor's having married her, and having settled that article as her dower,—in this case both plaintiffs are upon an equal footing; because the claim of each in point of strength is equal, since a contract of purchase, and of marriage, are both contracts of exchange, and both equally occasion a right of property.—This is according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* maintains that the plea of *purchase* is to be preferred, and that the husband must be made responsible to the woman for the value of the article in dispute; as by this means a preference is given to the plea of *purchase*, whilst at the same time the claims of both are attended to.

A plea of *pawnage* and *seizin* is preferable to a plea of *gift* and *seizin*.

IF one of two plaintiffs plead *pawnage* and *seizin*, and the other plead *gift* and *seizin*, and each produce evidence in support of his plea, in this case the plea of *pawnage* must be preferred.—This proceeds upon a favourable construction.—Analogy would suggest that the plea of *gift* ought to be preferred, because gifts occasion a *right of property*, whereas

whereas pawnage does not.—The reason for a more favourable construction in this instance is that seizure in virtue of *pawnage* occasions responsibility, which is not the case with respect to seizure in consequence of *gift*; and a contract which occasions *responsibility* is stronger than one which does *not* occasion it.—It is different where the gift is made *in exchange for some other thing*; because such a gift is ultimately a *sale*; and *sale* is stronger than *pawnage*.

IF two men claim an absolute right of property in the same article, which is in the possession of a third person, and each mention the date of commencement of his right, it must in that case be adjudged in favour of him who pleads the oldest date;—because having established his prior right of property, it follows that no other can afterwards obtain that but from him; and the other plaintiff, in this instance, has not obtained the right of property from him.

Two claims, equally supported, must be determined by the priority of date.

IF two men prefer a claim of *purchase* against another who is not the possessor of the article in dispute, and each bring evidence of his purchase, specifying different dates, the person who proves the prior date must be preferred, as he proves his right at a period when he had no opponent.

Two pleas of *purchase*, preferred against one person, must also be determined by the oldest date.

IF two claimants prefer an allegation of purchase, the one bringing evidence in proof of his having bought the article in dispute from *Zeyd*, and the other bringing evidence in proof of his having bought it from *Omar*, and the witnesses of each specify the dates of these purchases, in this case both plaintiffs are on a footing of equality, as each of them has established the right of property of his respective seller, and hence the case is the same as if the two *sellers* were themselves present and claimed their respective rights.—Each plaintiff, therefore, is at liberty to take the half of the thing at half of the price, or to relinquish his purchase entirely, for the reason before explained.

If, against two different persons, the article is adjudged equally between both claimants:

If

unless *one*
only adduce
evidence to a
date, when
it must be ad-
judged to
him.

Where four
claimants
plead a right
in a thing,
as derived
from four
different per-
sons, the ar-
ticle is ad-
judged
among them
in equal lots.

The evidence
of the *possessor*
must be pre-
ferred to that
of the *plain-
tiff*, where it
proves a prior
date of right.

If the witnesses of one of the parties specify a determinate time of payment, and not the witnesses of the other, still the *Kázee* must adjudge one half to each; because a knowledge of the length of credit does not imply priority in point of purchase;—nay, it is even probable that the other's right of property may have been of prior date, as the case supposes two different *sellers*.—(It is otherwise where there is only *one* seller, as in that case both parties are agreed in the derivation of their right of property from one and the same seller.)—If, on the other hand, one of the plaintiffs prove a *date of purchase*, and not the other, a decree must be passed in favour of the claimant whose date of purchase is ascertained, unless the purchase of the other can be proved to have preceded his.

If one plaintiff claim a right to an article from his having purchased it from *Zeyd*,—a *second*, from a gift of it to him by *Omar*,—a *third*, from inheritance from his father,—and a *fourth*, from its having been bestowed upon him in charity by a particular person,—and each of the four claimants adduce evidence in support of his claim, in this case the *Kázee* must adjudge the article among them, in four equal lots; because each of them pleads his right, as derived from a different person, and the case is therefore the same as if these four different persons had themselves appeared in court, and each proved his absolute right of property.

If a plaintiff adduce evidence to prove his right of property in a thing from a particular period, and the possessor of the thing adduce evidence to prove his right from a *prior* period, the evidence of the *possessor* must be preferred.—This is according to *Haneefa* and *Aboo Yoosaf*.—It appears also (from one tradition) to be the opinion of *Mohammed*.—According, however, to another tradition, *Mohammed* is of opinion that the evidence of the possessor ought not to be preferred; (and this is the sentiment he adopted and acted upon;) because, as each

each party produced evidence in support of his absolute *right of property*, without explaining the *cause* of that right, it follows that a priority or posteriority of date is in this instance immaterial.—The reasoning of *Haneefa* and *Abou Yoosaf* is that wherever a person proves his right of property in a thing at a particular period, the right of property of another in that thing at a *subsequent* period cannot otherwise be established than by its being derived from the *former*; but, in the case in question, the plaintiff has not pleaded the derivation of his right of property from the possessor; and therefore the evidence of the possessor is preferred.

If a plaintiff and possessor, respectively, bring evidence to prove each his right of property, in an *absolute* manner, (that is, without explaining the *instrument* or *cause* of it,) and the witnesses of one of the parties declare the *date* of his right, and not those of the other, in this case (according to *Haneefa* and *Mohammed*) the evidence of the plaintiff must be preferred.—*Abou Yoosaf* alleges that the evidence of the claimant of known date must be preferred; (and this, according to one tradition, is also the opinion of *Haneefa*;)—because the right of property of the claimant of known date is established in the *past*, whereas that of the other, in consequence of *his* evidence not mentioning any date, is only established in the *present*; and the *past* has precedence of the *present*;—in the same manner as where one of two claimants from purchase proves the date of his purchase, and the other does not; in which case the evidence of the former is preferred.—The reasoning of *Haneefa* and *Mohammed* is that the evidence adduced by the possessor of an article in dispute is admitted only as it tends to *repulsion*;—but, in the case in question, no property of repulsion exists, because it is in this instance doubtful whether the plaintiff may have derived his right in the article from the possessor or not, since it is possible that if the *plaintiff's* witnesses were to mention a date, that date might prove to be *prior*:—the evidence adduced by the *plaintiff* is therefore preferred.

The evidence on the part of the *plaintiff* is preferred, where the claim is laid *absolutely*:

and the same,
where the
subject in dis-
pute is im-
moveable pro-
perty.

A SIMILAR disagreement subsists with respect to a contested house in the possession of two plaintiffs: for, according to *Haneefa* and *Mohammed*, the house must be left in their possession, as before, and no regard whatever paid to the evidence on either part; whereas, according to *Abou Yoosaf*, a decree must be passed in favour of him who proves a date.—Supposing, however, the house to be in the possession of a *third* person, and all the other circumstances to be the same, in that case, according to *Haneefa*, both the claimants are upon an equal footing; whereas, according to *Abou Yoosaf*, the evidence on the part of him who proves the date must be preferred.—*Mohammed*, on the other hand, alleges that the evidence on the part of him who does *not* shew any date must be preferred; because he claims a prior right of property, on the ground that when a person claims property in an *absolute* manner, without specifying any date, and establishes his claim, he is entitled to more than one who specifies a date; as holds in a case of claim of acquisition by labour.—The argument of *Abou Yoosaf* is that the mention of a *date* is a certain corroboration of the claimant's right of property at that time; whereas the *omission* of a date admits of two constructions, as it leaves it doubtful whether the right of the other had existed *prior* or *posterior* to that period; and as *certainty* is always a cause of preference, he whose evidence goes to establish a *date* is therefore preferred;—in the same manner as where two persons claim the purchase of the same thing, and one of them specifies the date and not the other.—The argument of *Haneefa* is that the date mentioned by the *dating* claimant bears the construction either of *priority* or *posteriority*, in the same manner as the claim of the other, which is *absolute*, also bears two constructions: the claims of both are, therefore, on a footing of equality. It is otherwise in the case of two purchasers, where one specifies the date, and not the other; because purchase being a *supervening* circumstance, is therefore, when doubtful, referred to the nearest period; and hence, in that case, the reason for preferring the known date.

If a plaintiff and possessor should both bring evidence to prove a generation, as if each should bring evidence to prove that "such a camel" (for instance) is the offspring of a particular camel, which had "brought it forth whilst in his possession,"—in this case the claim of the possessor must be preferred; because, as the evidence is adduced upon a point which derives no additional proof from *actual possession*, it follows that the plaintiff and the possessor are both upon a perfect equality with respect to *plea and evidence*; and the evidence on the part of the possessor afterwards acquires a superiority from the circumstance of his *possession*: the *Kâzee* must therefore adjudge the camel to him.—This is approved.—*Yeesa Ibn Ayûn*, however, has asserted the contrary: for he maintains that as both evidences are in opposition to each other, they must both be rejected, and the camel left, as it was, in the hands of the possessor; but that it ought not to be decreed to him by the *Kâzee*.

Case of claims
to animals,
founded upon
generation:

If, in a suit respecting a *horse*, the plaintiff assert that he had purchased it from *Zeyd*, and that it was the offspring of a horse of *Zeyd*, and the possessor assert that he had bought it from *Omar*, and that it was the offspring of a horse of *Omar's*, and each bring evidence in proof of the horse having been produced from a dam in the possession of the seller, it is the same as if each had adduced evidence in proof of the horse having been produced in *his own possession*. If, on the other hand, one of the parties bring evidence in proof of his *right of property*, and the other in proof of the contrary, in this case the claim of the party proving the generation of the horse is preferred, whether he be the possessor or not; because, as the evidence adduced by him goes to prove his right of property *ab initio*, it follows that the right cannot afterwards exist in another, unless by a derivation of it from him.—In the same manner also, if, where *neither* of the parties is possessed of the horse, one prove that it was produced in his possession, and the other prove his right of property, a decree must pass in favour of him who proves the generation of the horse.—It is to be

observed that if the *Kázee* pass a decree in favour of the person who proves the production of the horse from one in his possession, and another person then prove, by evidence, the generation of it to have been from *his* property, the *Kázee* must, in that case, pass a decree in favour of that *third* person, unless the possessor *again* produce evidence in proof of the generation, in opposition to that person.

or to any
other pro-
perty found-
ed upon a
cause of right
equivalent to
generation.

THE same rule holds with respect to materials for making cloth, where they have undergone only one operation, (such as *spinning*, for instance.)—Thus, if a plaintiff and a possessor, respectively, assert that “the yarn in dispute is his property, and he has spun it himself,” and each bring evidence in support of his claim, in that case the *Kázee* must pass a decree in favour of the *possessor*, in the same manner as in a case of claim founded upon generation: and the same of every cause relating to property which is *simple* and not *complicated*, such, for instance, as the extracting of milk from an animal, the making of *cheese*, or of *felts*, the sheering of wool, and the like.—If, on the other hand, the cause of right of property be of a *complicated* nature, such as the *wearing of cloth*, the *planting of trees*, or the *sowing of wheat*, and a dispute arise between a plaintiff and possessor of any of these articles, the *Kázee* must pass a decree in favour of the *plaintiff*, and not of the *possessor*,—and so also, if a plaintiff and possessor, respectively, adduce evidence in proof of his absolute right of property, without explaining the cause.—If the cause be *doubtful*, (that is, if it be unknown whether *complicated* or *simple*,) recourse must be had to skilful persons; and if it appear doubtful to them also, the *Kázee* must in that case decree in favour of that plaintiff who is not the possessor; because the *original* principle is to pass the decree in conformity with the evidence adduced by the plaintiff; and although an exception be established in cases of claim founded upon *generation*, (because of a tradition of the prophet, who, upon a certain occasion, decided, in such a case, in favour of the *possessor*,) still, in a case where the cause is *doubtful*, and where of course it cannot be ascertained whether the article

is

is comprehended within the exception, recourse must be had to the original principle of the law.

If a plaintiff produce evidence in support of his absolute right of property in an article, and the possessor bring evidence to prove his having *purchased* the article from the plaintiff, the evidence of the *possessor* must be preferred; because, although the plaintiff plead that his right of property was of prior date, yet the possessor appears to have afterwards purchased the article from him, (which is in no respect repugnant thereto,) and hence the case is the same as if the possessor were first to acknowledge that the article had formerly belonged to the plaintiff, and then to assert that he had purchased it from him.

The possessor of an article, proving his having purchased it from the claimant, sets aside his plea.

If a plaintiff bring evidence to prove his purchase of the article in dispute from the possessor, and the possessor, on the other hand, bring evidence in proof of his having purchased it from the *plaintiff*, and neither party specify the date of his purchase, in this case the evidence of both falls to the ground, and the thing in dispute is left in the hands of the possessor.—The compiler of the *Hedaya* observes that this is according to *Haneefa* and *Aboo Yoosaf*: but that *Mohammed* has said that the *Kazee* must admit the evidence of both, and that then the thing goes to the *plaintiff*; because a conformity to the evidence of both is practicable, since it is possible that the possessor may have purchased the thing from the *plaintiff*, and having then received possession of it, may have afterwards sold it to him again.—This construction ought therefore to be adopted; more especially as seizure implies that the possessor must have made the first purchase; nor can the contrary, indeed, be supposed, because (according to *Mohammed*) a thing cannot be sold previous to the seller's possession of it, although it be *land*.—The reasoning of *Haneefa* and *Aboo Yoosaf* is that each of the parties, in pleading a purchase from the other, virtually makes an acknowledgment of the *right of property* in the other; and as, where each

If each party prove a purchase from the other (without specifying a date) no decree can take place:

each party makes an acknowledgment in favour of the other, the evidence of both must be set aside, according to all our doctors, so also in the case in question.—In reply to the assertion of *Mohammed*, it is to be observed that a conformity to the evidence of both is *impracticable*, in as much as the *cause*, namely, the *purchase*, is an object only as far as it is necessary to prove the existence of the *effect*, namely, *right of property*.—Now, in the case in question, it is impracticable to pass a decree in favour of the *possessor's* right of property, but by previously admitting the *plaintiff's* right; and hence if the *Kázee* were to pass a decree in favour of the possessor, it is a decree upon the *cause*, namely, the *purchase*, which would be vain and useless.

and so also,
if each prove
payment of the
price.

—If, in the case now under consideration, the witnesses of each party should give evidence of the payment of the price, (one thousand *dirms*, for instance,) in that case (according to *Haneefa* and *Aboo Yoosaf*) a *Mokáfa*, or *mutual liquidation*, takes place with respect to both prices, provided the prices be on an equality either with regard to *prompt payment*, or to a payment at a *limited period*, because in this case the seizure of each party induces responsibility.—If no evidence be given of the payment of the price, in this case also, according to *Mohammed*, a mutual liquidation takes place, because the price is due from each party to the other respectively, provided the witnesses of each separately testify to the sale, and also to the seizure of the article sold.—And here, in the opinion of all our doctors, the evidence of both parties falls to the ground; since, even according to *Mohammed*, a conformity to the evidence of both is impracticable in this instance; because both the sales are valid, as being both made after seizure: moreover, no date is specified, nor does any argument of a date exist by which a preference might be given to the one claim rather than to the other; they are therefore of equal force, and no superiority is assigned to the one over the other; and the evidence of both parties consequently is accounted of no force.—It is otherwise in the preceding case, because, as no mention is there made of the seizure of either party, a conformity

formity to the evidence of both is practicable, as has been already explained.

If the thing in dispute be *land*, and the witnesses of both parties specify the dates of purchase, without making any mention of the seizure of either party, in that case, where the date of the plaintiff's purchase precedes that of the *possessor*, the *Kâzee* (according to *Haneefa* and *Abou Yoosaf*) must pass a decree in favour of the *possessor*; and the dispute is settled as if the plaintiff had first purchased the land, and then sold it to the possessor previous to his own seizure of it, which in their opinion is lawful.—*Mohammed*, on the other hand, contends that the *Kâzee* ought to pass a decree in favour of the plaintiff; because, as (according to him) the sale of land previous to the seizure of it is not lawful, the land ought necessarily to remain with the plaintiff.—If, on the other hand, the witnesses of both parties give evidence also to the seizure, in that case the *Kâzee* must pass a decree in favour of the *possessor*, according to all our doctors; because both sales are in such an instance universally admitted to be valid. This, however, proceeds upon a supposition of the date of the plaintiff's purchase being prior to that of the *possessor's*: for if the date proved by the *possessor* be prior to that proved by the plaintiff, the *Kâzee* must pass a decree in favour of the plaintiff, whether the witnesses may or may not have specified the seizure; and the matter is adjusted as if the possessor had first purchased the thing from the plaintiff, and having received seizure of it, had afterwards sold it to the plaintiff, without having as yet delivered it to him; or as if, having delivered it, it had reverted to him again from some other cause.

In disputes concerning *land*, a decree must be passed in favour of the last purchaser.

If one of two plaintiffs produce *two*, and the other plaintiff produce *four* witnesses, still they are on an equal footing; because, as the testimony of each two of the four witnesses is a complete cause, or ground of decision, it follows that the evidence of four witnesses amounts merely to *two causes*; and a multiplicity of causes is no argument of

superiority,

The production of any number of witnesses above the lawful number makes no difference with respect to the decree.

superiority, since it is in the *strength* of a cause, and not in the *number*, that a superiority lies.

Case of a claim made by two persons to a house; where one claims the half and the other the whole.

If a house in possession of any person be claimed by two other persons, one of them alleging his right to the *whole*, and the other to the *half*, and each bring evidence in proof of his claim, in this case the *Kâzee* must adjudge three fourths to the claimant of the *whole*, and one fourth to the claimant of the *half*, according to *Haneefa*, because (agreeable to his tenets) regard must be had to the *nature of the dispute*; and as, in the present instance, no dispute subsists with respect to *one half*, that half goes exclusively to the claimant of the *whole*; but as there is a dispute between the parties respecting the other *half*, and as they are both upon an equal footing with regard to the *ground* of their claim, that half therefore goes to them both in equal proportions.—The two disciples allege that the house must be divided between the claimants in three equal lots, two going to the plaintiff for the *whole*, and one to the plaintiff for the *half*; because, according to them, regard must be had to *arithmetical proportion*; in other words, the plaintiff for the *whole*, in consideration of his claim, which is to the *two halves*, is entitled to *two* lots, and the plaintiff for the *half*, in consideration of his claim, which is to *one half*, is entitled to *one* lot: the house, therefore, is divided between them in three lots.—If, on the other hand, the house in dispute be in the possession of the *parties*, the whole of the house in that case goes to the claimant of the *whole*; for he receives the half possessed by the claimant of the *half* in consequence of a decree of the *Kâzee*, (which decree must necessarily be granted him, since in being a claimant for the *whole*, he is a claimant for that half, without having possession of it, and judgment must therefore be given according to his evidence;)—and he keeps the other half, of which he was himself possessed, as it is a necessary inference that the claim of the other plaintiff related only to that half of which he was in possession, since if he were to prefer a claim to the *other half*, it must follow that the half of which he is in possession

is held by an unjust tenure:—and as no claim subsists with respect to the half in the hands of the claimant of the whole, it consequently remains with him.—In short, the *whole house* remains with him.

If two persons lay claim to an animal, and each adduce evidence to prove its production, at the same time specifying the date, in this case the animal must be adjudged to the claimant whose witnesses specified a date apparently according with the age of the animal; because, as probability is an argument in his favour, he is therefore entitled to a preference.—If, however, the age of the animal be *doubtful*, and an agreement with the date on one side or the other not apparent, it must then be adjudged in an equal degree to both, and the specification of dates set aside: that is, the case must be considered in the same light as if no dates had been mentioned.—If, on the other hand, *both* the dates be repugnant to the apparent age of the animal, the evidence of each party is nugatory, (and such also is reported from *Hakim*,) because the falsity of the evidence on both parts is in such a case manifest:—the animal is therefore left with the person who may be in possession of it.

In claims founded upon generation regard must be paid to the date stated by the claimant.

If two persons severally prefer a plea against another who is in possession of a slave; the one pleading that “the possessor has *usurped* the said slave from him,” and the other, that “he has committed the said slave to him in *trust*,” in this case the *Kazee* must decree one half of the slave to each, as their claims are equally strong.

One party pleading a *trust*, and the other asserting an *usurpation*, each is upon an equal footing.

SECTION.

Of DISPUTES concerning POSSESSION.

The possession
of an animal
is ascertained
by any act
which implies
an use of the
animal.

If two men dispute the possession of an animal, one of them being mounted upon it, and the other holding the bridle, in this case the claim of the *rider* is the strongest, since his act of *riding* upon it is an act in virtue of right of property.—In the same manner, also, if one of them be riding on the *saddle*, and the other on the *croup*, the claim of the person seated upon the *saddle* is preferable. It is otherwise, however, if they be mounted upon an animal without a saddle; for in this case the property of the animal is divided between them, as both are, with respect to the act of *riding*, upon an equal footing in such an instance.

If two men contend concerning a camel, the one having a burden, his own property, upon it, and the other having in his hand the *Mobar* or rope that guides it, the right of the person having the *burden* upon it is preferable, as the camel is employed in *his service*.

The right of
one using a
thing is pre-
ferable to that
of one laying
hold of it.

If two men dispute respecting an under garment, the one wearing it, and the other holding the *sleeve* of it, the claim of the *wearer* is preferable, as his act is evident.

If two persons should dispute concerning a carpet, the one being seated upon it, and the other having hold of it with his hand, the *Kâzee* must not pass a decree in favour of either.

IF two persons dispute concerning a piece of cloth, the one enclosing great part of it in his hand, and the other having hold of the *border* of it, in this case the cloth is equally parted between them, because the greater quantity held by the one than the other does not give a superiority of claim, as it goes only to furnish one *argument* or *proof*.

IF a boy * be in the possession of any person, and, being capable of explaining his own condition, declare that "he is *free*," his assertion must be credited, in as much as he is his own master.—If, on the other hand, he declare himself to be the *slave* of some other person than the possessor, he is adjudged to be the property of the possessor, because, in declaring himself a *slave*, he acknowledges that he is not his own master.—If, also, the boy be not capable of explaining his own condition, he is adjudged to be the property of the possessor, because not being his own master he is considered in the same light as *clothes* or any similar article:—and if, after attaining maturity, he claim his freedom, his plea will not be admitted, because his slavery during his childhood became apparent; and no matter that becomes apparent can afterwards be set aside excepting upon proof †.

Right of possession over a *foundling* is established by his own acknowledgment.

IF there be ten apartments of a *Serai* in the possession of one man, and one apartment in the possession of another, and they enter into a contention respecting the court of the *Serai*, in this case the claim of both must be adjudged to be equal, since both have an equal right to the use of it, and to pass through it.

The court of a *Serai* is adjudged between the disputants.

* Undoubtedly meaning a *foundling*, or *strayed* child.

† The translator has omitted a case of considerable length, which immediately follows, relative to the claim of sundry persons to a wall, founded upon different circumstances which argue right of property. These circumstances the translator has not been able to procure a satisfactory explanation of; and they are probably such as relate to antiquated customs in *Arabia*.

A decree cannot be issued, respecting a claim to land, without the adduction of evidence.

If two men claim a piece of ground, each, respectively, asserting it to be "in his possession," the *Kāzee* in this case must not pass a decree in favour of the possession of either, until evidence be produced; since possession of land is not of a nature to be *actually seen* by the *Kāzee*, because of the impracticability of producing it in court; and also, because it is necessary to prove by evidence whatever is concealed from the knowledge of the *Kāzee*.—If, therefore, either of the parties produce evidence in support of his claim, the land must be adjudged to be in his possession; because of the establishment of proof, and also because *possession* is a right which is the object of desire, in the same manner as other rights.—If *both* parties produce evidence in support of their claims, the ground must in that case be adjudged to be jointly in possession of both.—If, however, one of the claimants should have made *bricks* upon the ground, or should have *built* upon it, or *dug a well* or a *ditch* in it, in all these cases the possession must be adjudged to him on account of those acts.

CHAP. V.

Of Claim of Parentage.

A claim made by the seller of a female slave to a child born of her within less than six months after the sale, is established:

If a person sell a female slave, and she afterwards bring forth a child, and the seller claim it,—in that case, provided the birth take place in less than six months from the sale, the child is adjudged to the seller, and the mother is his *Am-Wahid*.—This is according to a favourable construction of the law. In the opinion of *Ziffer* and *Shafēi* the claim is null; and this is agreeable to analogy; because the seller, in making the

the sale, has virtually acknowledged the child to be a slave, which is inconsistent with his plea of its being *his child*.—The reason for a more favourable construction in this particular is, that as the birth happened in less than six months from the sale, it is evident that the conception must have existed whilst the slave was in the possession of the seller; and this argues the conception to have proceeded from the seller, since there is no reason to suppose that the woman was guilty of whoredom. As pregnancy, moreover, is a circumstance which may remain unknown for a time, the seller is on this account vindicated from the charge of prevarication or inconsistency, and his claim is consequently valid.—Now as his claim of parentage is valid, it is therefore referred to the period of conception; and hence it appears that the man has sold his *Am-Walid*; and as the sale of an *Am-Walid* is unlawful, it must therefore be annulled, and the price must be returned by the purchaser, as having been unjustly obtained.—If, on the other hand, the purchaser should, either at the same time with, or posterior to, the claim of the seller, claim the parentage of the child, in that case, also, the claim of the seller is preferred, because of its having existed prior to that of the purchaser, as being referred to the period of conception.—Supposing, however, the child to be born *two years* after the sale, the seller's claim of parentage is not in that case valid; because the conception, in this instance, could not possibly have taken place during his possession of the slave, and this is the only idea under which a decision could pass in his favour:—his claim, therefore, cannot be admitted unless it be confirmed by the purchaser; in which case the parentage of the child is established in the seller, as on a supposition of *marriage*:—for this reason, however, the child is not *free*, nor is the sale annulled, since it is evident that the conception did not take place whilst the slave was in the seller's possession:—the child's freedom, therefore, is unestablished, as well as the eventual freedom of the mother*.—Supposing, also, the child to

and if the purchaser maketh the same claim, still the claim of the seller is preferred.

If the birth happen within from six months to two years after the sale, his claim is not admitted without the verification of the purchaser.

* Namely, her becoming an *Am-Walid*, which would have given her an *eventual claim* to freedom. (See Vol. I. p. 479.)

The mother becomes his *Am Walid* if the child be living at the time of the claim.

be born at any period *more* than six months and *less* than two years from the date of the sale, the claim of parentage by the seller cannot be admitted, unless it be verified by the purchaser; since, in this instance also, it is not absolutely certain that the conception took place during the seller's right of property, wherefore there is no proof, and hence the necessity of the verification of the purchaser.—If, therefore, the purchaser verify the claim of the seller, the parentage is established in him, and the sale is annulled, and the child is free, and the mother becomes an *Am-Walid*, in the same manner as in the first instance; because the seller and the purchaser are both agreed in the circumstance of conception having taken place during the right of property of the seller.—If the child, having been born in *less* than six months from the sale, should die, and the seller should afterwards claim his parentage, the mother does not in that case become his *Am-Walid*; because she is a dependant on the *child*, with regard to her eventual claim to freedom; and the child not being extant to admit of its issue from the seller being proved, she cannot of course become his *Am-Walid*.—If, on the other hand, the *mother* were to die, where the child had been born in less than six months from the sale, and the seller claim his parentage, in this case the parentage of the child is established in the seller, and he is entitled to resume the child; because the child is the *principal* with respect to the establishment of the parentage, and cannot therefore be affected by the extinction of a dependancy in the death of the mother.—In this case the seller, according to *Haneefa*, must return the whole of the price, because it becomes apparent that he sold his *Am-Walid*, and *Haneefa* holds that the property involved in an *Am-Walid* is not of an appreciable nature, in sales and usurpations, and that therefore the purchaser is not responsible for it in the present instance.—In the opinion of the two disciples, however, he ought only to return a *proportion* of the price adequate to the value of the child, because (according to them) the property involved in an *Am-Walid* is of an appreciable nature, and consequently induces responsibility in a purchaser.

It is related, in the *Jama Sagbeer*, that if a female slave, being pregnant, should be sold by her master, and having afterwards brought forth a child, the seller should claim the child after she had been emancipated by the purchaser, in this case the child is considered as the offspring of the seller, and he must return to the purchaser a part of the price proportionate to its value. This also accords with the opinion of the two disciples. *Haneefa* alleges that the seller must return the whole of the price, in the same manner as in case of the mother's death; and this is approved.—If, however, the purchaser should have emancipated the *child* only, in this case the claim of the seller is null.—The reason for the distinction between these two cases is as follows.—In the *former* case, the child being the *principal* with regard to the claim, and the mother only a *dependancy*, (as has been already explained,) it follows that the bar to the claim of parentage and claim of offspring (namely, *emancipation*) exists in the *dependant*, that is, in the *mother*,—and consequently cannot operate upon the *child*, who is a *principal*:—the claim to the child is therefore approved, and it is accordingly free; and the parentage is established in the seller. The freedom of the child, moreover, or the establishment of parentage, do not necessarily infer that the mother also is emancipated;—(whence it is that the child of a *Magroor* is free, whilst the mother remains a slave;—and also, that if a person marry the female slave of another, and beget a child upon her, the parentage is established in him, whilst the mother continues the slave of her master.)—In the *second* case, on the contrary, the bar exists in the *child*, who is the *principal*, and hence the claim cannot be made good either with respect to the *principal* or the *dependancy*.—The freedom of the child is a bar to the validity of the claim, because, as *emancipation* is incapable of annulment, in the same manner as a claim of parentage or of offspring are incapable of it, they are therefore both of equal force. Now, in the case in question, an actual manumission has been established on the part of the purchaser, whilst on the part of the seller, on the other hand, is established a right of claim in regard to the *child*, and a right of emancipation.

If made by the seller, after the mother has been emancipated by the purchaser, it is valid: but if the *child* should have been emancipated by him it is null.

cipation in regard to the *mother*; but a mere *right* to a thing cannot be opposed to the actual thing itself.—It is also to be observed that the purchaser's creating the child a *Modabbir* is, in this respect, equivalent to the complete emancipation of him, as that also is incapable of annulment, and is, moreover, followed by certain of the effects of emancipation,—such, for instance, as preventing *sale*.

A claim made by the original seller, after a second sale, is valid; and that sale is null.

If a person sell a slave, that has been born of a female slave, who was his property at the time of the birth *, and the purchaser afterwards sell him to another person, and the first seller then claim him, in that case the slave in question is his child, and the sale is null; because sale is capable of annulment, whereas the right of this person to claim the parentage of the slave is incapable of it; the sale is accordingly annulled.—In the same manner, if the buyer, after the purchase of the mother and son, should make a *Mokâtib* of the former, or pledge him, or let him out to hire,—or, if he should make a *Mokâtiba* of the mother, or pledge her, or give her in marriage to some person, and the seller afterwards claim the child,—in any of these cases his claim must be admitted; and all the several contracts mentioned are annulled, as they are all capable of annulment.—It is otherwise where the purchaser emancipates or makes a *Modabbir* of the child,—as has been already explained:—and it is also otherwise where the purchaser first claims him as his child, and afterwards the seller,—because the parentage, after having been established in the purchaser, cannot again be established in the seller, as it is a right which is incapable of annulment, and hence the case is the same as if the purchaser had emancipated him.

A claim established with respect

If a female slave bring forth twins, and the proprietor claim the parentage of one of them, in this case the establishment of parentage

* This case supposes the child and the mother to be sold together, as appears by the context a little further on.

in him, with respect to *one* of them, necessarily involves the same with respect to the *other*; because they must both have been conceived from one seed; for this reason, that by *twins* is understood two children born of the same mother, and between the birth of whom a period of less than six months has intervened,—and it is therefore impossible that the conception of the other child should have been *supervient* and *separate*, as pregnancy * cannot be short of *six months*.—It is related, in the *Jama Sagbeer*, that if a person be possessed of two slaves, twins, who had been born his property, and he should sell one of them, and the purchaser emancipate him, and the seller afterwards avow, as his issue, the one who remains in his hands, in this case both the twins are his children, and the emancipation of the purchaser is null †; because, upon the parentage being established of the one in his possession, by which he becomes free, the parentage and consequent freedom of the *other* are necessarily involved, as they are *twins*. Hence, as it appears that the purchaser bought a person who was originally free, it follows that his purchase, and consequently his emancipation of him, is null.—It is otherwise where there is only *one* slave, for in this case the buyer's purchase and consequent emancipation are not liable to be annulled upon the seller establishing his claim; whereas, in the case now under consideration, the emancipation of the purchaser is rendered null *dependantly*; in other words, freedom is first established in the slave who remained in the claimant's hands, and is then, *dependantly*, established in him who was sold and afterwards emancipated. There is therefore a material difference between the cases ‡.

* Meaning the pregnancy requisite to produce a *perfect* child.

† One effect of which is to destroy his right of *Willa*, which he would otherwise have enjoyed.

‡ This case has been somewhat abridged in the translation, and in particular the latter part of it is entirely omitted, as being a mere repetition.

to one twin A
establishes it
with respect
to the other
also.

A claim of offspring cannot be established, after an acknowledgment in favour of another person.

IF a person be possessed of a boy, and declare the boy to be the son of a certain absent slave, and afterwards declare him to be his *own* son, in this case the parentage of the possessor can never be established, although the absent slave were to *deny* the boy to be his son.—This is according to *Haneefa*. The two disciples have said that, in case of the denial of the slave, the parentage of the possessor is established.—A similar disagreement subsists where the possessor declares the boy in his possession to be the son of a particular person, and born of his wife, and afterwards himself claims the parentage of him.—The reasoning of the two disciples is that the acknowledgment, by the master, of the boy being the son of his slave, is repelled by the denial of the slave, whence the case becomes the same as if no such acknowledgment had ever been made.—Now, although parentage cannot be annulled after the establishment of it, yet an *acknowledgment* of parentage is set aside by the denial of the person who is the object of it, and the acknowledgment is ascribed to levity or compulsion;—(as if a person, by way of levity, or under the influence of compulsion, should make an acknowledgment that his slave was his *son*, in which case his acknowledgment is not valid:)—the case in question, therefore, becomes the same as if a purchaser of a slave should acknowledge that the “seller” had emancipated him,” and the seller deny the same, and the purchaser then say that “he had *himself* emancipated him;” for in this case the last assertion of the *purchaser* is credited, and the *will*-right with respect to the slave thus emancipated rests with him; and his acknowledgment with regard to the seller is considered as never having existed; so also in the case in question.—It would be otherwise if the *boy* should verify the first assertion of the possessor, (that “he is the son of a certain absent slave,”) and the possessor himself should then claim the issue; because the claim would in such a case be invalid, as having been preferred after the proof of parentage in another. It would also be otherwise if the slave should remain silent, without either confirming or denying the claim; for, in this case also, the subsequent claim of the possessor would be invalid, because the

right of the person acknowledged relates to the *boy*, and there is a possibility that he may *verify* the assertion of the possessor.—The boy, therefore, in this instance, stands in the same predicament with the son of a woman who has been required to make *affecration**, and whose parentage cannot be proved by any other than the *imprecator*, (namely, the husband of the woman,) who has the power of afterward contradicting himself, and declaring that the said son is his *issue*.—*Haneefa*, on the other hand, argues that parentage is a matter which, after proof, cannot be set aside; nor can the acknowledgment of such a matter be undone by the rejection of the person who is the object of it: it therefore continues in force notwithstanding the rejection; and hence the claim of the master, subsequent to such acknowledgment, is invalid, although the slave should *contradict* the acknowledgment; in the same manner as if a person should bear testimony to the parentage of an infant, and, his testimony being set aside from suspicion, he should then claim the said infant as his son; in which case his claim would not be valid; and so also in the case in question. The ground on which this proceeds is that the right of the person in question (namely, the *slave*) relates to the *boy*, inasmuch that, if the slave should verify the assertion of the master subsequent to a contradiction, the parentage of the boy is established in the slave; and, in the same manner, the right of the boy is connected with the acknowledgment of the master; and hence the acknowledgment cannot be set aside by the contradiction of the slave†.—With respect to the case of a purchaser acquiring the right of *Willa*, adduced by the two disciples as analogous to this, it may be replied that a disagreement subsists concerning this case also; as *Haneefa* does not admit the doctrine there advanced:—or, if it be admitted, still there subsists

* See Vol. I. p. 344.

† Because a declaration which tends to establish a right cannot be revoked: and, in the case in question, the right of the boy is to have his parentage established and ascertained.

this difference between it and the case in question, that *Willa* is capable of annulment,—in other words, the right of *Willa* in one person is sometimes set aside in favour of another, when any supervenient circumstance occurs to strengthen the claims of that other. Thus, if *Zeyd* should contract his female slave in marriage with the slave of *Kbálid*, and after their having issue should emancipate the mother, in this case the right of *Willa*, or patronage, over the child, belongs to *Zeyd*; but if afterwards *Kbálid* should emancipate his slave, who is the father of the child, then the right of *Willa* over the child would be annulled in *Zeyd*, and would vest in *Kbálid*, the emancipator of the father, since the right derived from the emancipation of the *father* is stronger than that derived from the emancipation of the *mother*:—whereas, in the case exemplified by the two disciples, the establishment of the right of *Willa* in the seller of the slave rests on the supposition of the seller, after having contradicted the purchaser, again contradicting himself, and verifying the assertion of the purchaser; and when, in this state of suspended *Willa*, a circumstance intervenes which operates as a stronger cause for the establishment of the *Willa* in the purchaser, the suspended *Willa* in the seller becomes null.—The circumstance here alluded to is the assertion of the purchaser that “he emancipated the slave;” and this operates as a *stronger* cause, since it gives immediate freedom to the slave in consequence of his being the property of the purchaser, whereas the emancipation of the seller does not give immediate freedom, as it rests upon the verification of the purchaser, and hence becomes null on the supervention of a stronger cause; because *Willa* is capable of annulment; contrary to *parentage*, as has been already explained.—From this doctrine of *Haneefa*, that the possessor’s acknowledgment of the boy being the son of his slave cannot afterwards be set aside by the contradiction of the person who is the subject of that acknowledgment,—and that, consequently, any subsequent claim of the possessor to the parentage of the child will not be valid,—it follows that a decree may be founded upon it for establishing the validity of a father’s selling his son begotten upon his slave;

slave; for, in order to remove any apprehensions from the mind of the purchaser of his afterwards claiming his son, and thereby rendering the sale null, he may make an acknowledgment of the issue in favour of another, by which means he will effectually preclude the possibility of *himself* afterwards preferring a valid claim to him.

If a boy be in the possession of *two* men, of whom one is a *Mussulman* and the other a *Christian*, and the *Christian* assert that "he is his *son*," and the *Mussulman* that "he is his *slave*," he must in this case be decreed to be the *son of the Christian*, and *free*; because, although the religion of *Islám* have a superiority, yet that superiority is allowed to operate only in cases which are balanced against each other; but there is no balance between a claim of *offspring* and of *bondage*: the claim of the *Christian* is therefore admitted; because this is attended with a great benefit to the boy, since it procures him *immediate freedom*, and (as may also be expected) *future faith*, in as much as the arguments for the unity of the Godhead are evident and plain; whereas, if a contrary decree be passed, (that is, if the boy should be decreed to be the slave of the *Mussulman*, and not the son of the *Christian*,) in that case the true faith in the boy would be established merely from *dependance*, whilst he must be precluded from *freedom*, as not having the power himself to acquire it.—If, however, both the *Mussulman* and the *Christian* claim the issue, the claim of the *Mussulman* must in that case be preferred, on account of the superiority due to the *true faith*, and because of the superior advantage that would result to the boy.

If a married woman should claim parentage, as if she should say, "this boy in my arms is my son," her claim is not valid unless the birth be attested by the testimony of *one woman*; because the claim so made relates to another, and is therefore not admitted unless supported by *proof*: in contradiction to the case of a *father*, as has claim of parentage relates purely to *himself*.—(It is to be observed that the testimony

A claim of parentage made by a *Christian* is preferable to a claim of bondage advanced by a *Mussulman*.

A claim of parentage, by a married woman, is not admitted, unless at least *one woman* testify to the birth;

or (if she be
in her *edit*)
one man and
two women:

mony of the *midwife* alone is sufficient with respect to birth, since the object of the testimony is merely to ascertain that the child in question is the identical child which the said woman brought forth; whilst parentage, on the other hand, is established on the ground of the mother of the child being the wife of the husband:—it is, moreover, recorded, in the *Nakl Sabeeh*, that the prophet accepted the testimony of a *midwife*, in a case of birth.)—If, however, the woman in question be in her *edit* from a complete divorce, the testimony of the *midwife* alone does not suffice with respect to the birth;—on the contrary, that of two men, or of one man and two women, is requisite.—(This is the doctrine according to the opinion of *Haneefa*, as has been already mentioned in treating of divorce.)

but if her
husband ve-
rify her
claim, there
is no occasion
for such evi-
dence.

If the woman be neither married, nor in her *edit* from divorce, in this case lawyers have asserted that the parentage of the child is established by *herself*; her own assertion on this head being admitted; since, in this case, it does not operate upon, or affect, any other person.—But if, being married, she should say, “this is my son, begotten by this my husband,” and the husband verify the same, there is in this case no occasion for one witness to prove the birth, since the acknowledgment of the husband renders it unnecessary.—If the boy be in the joint possession of the wife and her husband, and the husband should say “this boy is my son, begotten not on this woman “but on another,” and the woman should say “this is my son, begotten by another husband,” in this case the boy is decreed to be their son, because of the probability of the thing founded upon their joint possession of the boy, and their connection with each other as husband and wife. Besides, the assertion of each has a tendency to destroy the right of the other, and therefore that of neither ought to be adopted.—This case resembles that where each of two men, having jointly the possession of a piece of cloth, asserts that it is the joint property of himself and some other person, in which case the cloth is adjudged to be the property of the two possessors.—There is, however, this

this difference between these two cases,—that, in the case of the *cloth*, the other persons, in favour of whom the parties have respectively made an acknowledgment, are admitted to a participation in the shares of their respective acknowledgers, because of the subject of contention (namely, the *cloth*) being capable of division;—whereas, in the case in question, the persons referred to are not admitted to a participation in the right of the acknowledgers, since *parentage* (which is the subject of it) does not admit of participation.

If a person purchase a female slave, and beget a child upon her, and claim it, after its birth, as his issue, and it afterwards appear that the slave had *not* been the property of the *seller*, in this case the purchaser must give, to the rightful master of the slave, the value which the child may bear at the time of contention,—and the child is *free*; *first*, because he is the offspring of a *Magroor*; for a *Magroor* is defined to be a person who begets a child upon a woman, on the belief of her being his property,—(or whom he has in that belief married,)—and who afterwards proves to be the property of another; and this definition of a *Magroor* is exactly applicable to the person in question; the issue of a *Magroor* is therefore free for an equivalent, according to all the companions;—in the *second* place, a regard must be had to the right of both parties.—The said child is therefore completely *free*, in behalf of his *father*, and a *slave* in behalf of the plaintiff, namely, the proprietor of his mother.—Now, since the child remains in the possession of the father without any transgression or unwarrantable act on the part of the father, the father is therefore not responsible for it unless he become a bar to the seizure of it by the proprietor, (in the same manner as is decreed in the case of the child of an usurped female slave;) and he is a bar only where, the plaintiff having demanded the child, he [the father] refuses to surrender him; whence it is that the value of the child is estimated from the day of contention, as it is then that the bar begins to operate. If, therefore, the child should die in the possession of the father, without any contention having happened,

the

Case of a person begetting a child upon a female slave, under an erroneous possession.

the father is in no degree responsible, since no bar had taken place; and hence, also, if the child should die possessed of property, the father inherits it, as the child was completely free in right of his father.—If, on the other hand, the father should *kill* the son, he must in this case make compensation for the value, since he himself operated as a bar to the proprietor's right.—In the same manner also, if any *other* than the father were to kill the child, and the father exact the *fine of blood*, he must pay the value to the proprietor; because, although the child be destroyed, yet the compensation remains whole and entire in the hands of the father, (since the *fine of blood* is a compensation;) and, as the existence of the compensation is equivalent to the existence of the thing itself, and the bar to the compensation is equivalent to the bar to the thing itself, it follows that it is incumbent on him to give the value, in the same manner as it would have been incumbent on him in case of the existence of the child.—It is to be observed that the purchaser, after paying a compensation for the value of the child, is entitled to receive the said value from the seller, since the seller was responsible to him for the safety and preservation of it; he is therefore entitled to exact from the seller the value of the child, in the same manner as the price of the mother.—It is different, however, with respect to the *Akir*, or *fine of trespass*, as he is not entitled to exact that from the seller.—The purchaser therefore, as having had carnal knowledge of a woman who was the property of another, although he be exempted from punishment for whoredom, because of the doubt which existed, is notwithstanding required to pay to the proprietor an *Akir*, or *fine of trespass*;—but he must not demand a reimbursement for the *Akir* from the seller, because he became liable to pay it for the commission of an act of which he himself reaped the sole benefit.

HEDÂRA.

H E D A R A .

When a person possessing a right of property, and arrived at the age of maturity, makes an acknowledgment of a right, such acknowledgment is binding upon him, whether the subject of it be known or unknown; because acknowledgment (as has been already explained) is an avowal of the right of another upon one's self, and by acknowledgment the right of another becomes binding;—and this argues the establishment of such right; because, property being defined by all men, it is not likely that any person would establish the right of another to a property, unless he considered it as his own. It is as if he were in consequence of his acknowledgment of a right of another to a property, to deprive that acknowledgment of its effect.

BOOK XXV. OF IKRAR, or ACKNOWLEDGMENTS.

IKRAR, in the language of the LAW, means the notification or avowal of the right of another upon one's self.—The person making such acknowledgment is termed *Mookir*;—the person in whose favour the acknowledgment is made is termed *Mookir-lee-boo*; and the thing which is the subject of the acknowledgment is termed *Mookir-be-bee*.

The points
Definition of
the term.

Chap. I. Introductory.

Chap. II. Of Exceptions, and what is deemed equivalent to Exception.

Chap. III. Of Acknowledgments made by Sick Persons.

C H A P. I.

Acknowledgment, proceeding from a competent person, is binding upon the acknowledger,

but not upon any other person.

The points that establish competency are freedom,

W H E N a person possessing sanity of mind; and arrived at the age of maturity, makes an acknowledgment of a right, such acknowledgment is binding upon him, whether the subject of it be known or unknown; because acknowledgment (as has been already explained) is an avowal of the right of another upon one's self, and by acknowledgment the right of another becomes binding;—and this argues the establishment of such right; because, *property* being desired by all men, it is not likely that any person would *falsely* establish the right of another to a part of his own. Besides, the prophet ordered *Mdax* to be stoned in consequence of his acknowledgment of whoredom.—It is proper, in this place, to observe that *acknowledgment* is a *defective* proof,—in other words, it operates only upon the person of the *acknowledger*, and not upon that of another, since over *that* he has no power.—*Freedom* is established as a necessary qualification in an *acknowledger*, in order that his acknowledgment may be valid, *absolutely*,—(that is to say, with respect to *property* and the like;) for although a *privileged* slave be, virtually, the same as a *freeman* with respect to *acknowledgment*, yet the acknowledgment of an *inhibited* slave is not valid with respect to *property*, but merely with respect to *punishment*, or *retaliation*.—The reason of this is that the acknowledgment of an *inhibited* slave induces the obligation of a debt upon himself; and his *self* being the property of his *master*, it is consequently the same as if he had made an acknowledgment in regard to *another*, which is not lawful.—It is otherwise with respect to a *privileged* slave: for his acknowledgment is valid, as his master, in privileging him, does virtually assent to his contracting debts.—It is otherwise, also, with respect to the acknowledgment of *inhibited* slaves,

slaves, in cases of punishment and retaliation; for if an inhibited slave should say, "I have committed whoredom with a certain woman,"—or "I have killed a certain person,"—his acknowledgment would in these cases be valid; since a slave, in matters relative to punishment and retaliation, is allowed to assume his original condition of *freedom*; (whence it is that the acknowledgment of his master with regard to him in these cases is invalid.)—Sanity of mind, and maturity of years, are also necessary conditions in acknowledgment, because the acknowledgment of an *infant* or an *idiot* is invalid, as neither has any power to assume an obligation upon himself. The acknowledgment of a *privileged* infant is, however, valid, as he is virtually a *major*.

sanity of mind,
and maturity.

IGNORANCE, with respect to the subject, is not destructive of the validity of acknowledgment, since it sometimes happens that an *unknown* right is due; as where, for instance, a person destroys something belonging to another, of which the value was not known to the owner,—or gives a person a wound, of which the specific fine is not known at the instant,—or, where a person has accounts to settle with another, and of which he knows not the exact balance in favour of the other. Acknowledgment, moreover, is an intimation of the right of another; and the acknowledgment of an *unknown* right is therefore valid.—(It is otherwise where the *person in whose favour the acknowledgment is made* is unknown; for this is invalid, as a right or claim cannot rest in an unknown person.)—As the acknowledgment, therefore, of an unknown right is valid, the acknowledger must be required to define the unknown thing, since it is with him that the ignorance originates;—in the same manner as where a person emancipates one of two slaves,—in which case he is required to specify the one to whom the emancipation applies.—If the acknowledger should refuse to make the specification, then the *Kazee* must *compel* him; since it is incumbent upon him to disengage himself from the responsibility founded upon a valid acknowledgment, which he has incurred, and this cannot be effectual but by a specification.

Acknowledgment is not invalidated by ignorance of the subject.

but it is so, by ignorance of the person in whose favour the acknowledgment is made.

Acknowledgment generally made must be specified to relate to something of a *valuable* nature;

If a person say "I owe a thing (or a *right*) to a certain person," it is incumbent on him to specify something *valuable*; because he has acknowledged an obligation; and a thing which does not bear value induces no obligation: if, therefore, he specify something which bears *no* value, it is considered as a retraction of his acknowledgment; which in temporal concerns is not admitted.—In the same manner, also, if a person should say "I have *usurped* a thing from a certain person," it is incumbent on him to explain it to be something bearing value, and to the taking of which there existed some bar and prevention; since usurpation is not established unless there be a bar to the taking of it; and according to established custom there is *no* bar where the thing in question bears no value.

and if more be claimed than the acknowledger specifies, his assertion, upon oath, is credited.

If a person make an acknowledgment with respect to an unknown *thing*, or an unknown *right*, and define it to be something bearing value, and the person in whose favour the acknowledgment is made should claim *more* than is defined by the acknowledger,—in this case the assertion of the *acknowledger*, corroborated by an oath, must be credited.

An acknowledgment, expressed under the general term *property*, must be received according to the explanation of the acknowledger:

but, if made to a *GREAT property*, it cannot mean

If a person say "*property* * is due by me to a certain person," he must explain the amount; and his explanation must be credited, whether it be great or small, since great and small are alike applicable to property.—If, however, he specify less than one *dirm*, it is not to be admitted, since, in common usage, any thing short of a *dirm* is not reckoned *property*.

If he should say "a *great* property is due by me," then, provided he explain it to be *less* than two hundred *dirms*, it cannot be admitted according to the two disciples, (and also according to one re-

* Arab. *Mâl*; meaning property in *cash*, or in the *precious metals*, &c. in opposition to *Rakht* and *Mattâ*, which are particularly applied to *goods* and *effects*.

port from *Haneefa*;) because, where he describes the property in question, as being *considerable*, his explanation to any amount short of two hundred *dirms* is not to be credited; for, if it were otherwise, his description of *great* would be idle and nugatory, since the smallest sum which can properly be termed *great* is that which constitutes a *Nisáb* in *Zakát**,—namely, two hundred *dirms*; as it is the possession of this sum which brings a person within the description of *wealthy*.—There is another opinion ascribed to *Haneefa*, that the explanation, if it be *less* than ten *dirms*, (which is the *Nisáb* fixed for *theft*†,) must not be admitted; because ten *dirms* are what may properly be termed a *great* property, whence it is that, for the theft of that quantity, the hand of man (which is otherwise sacred) is cut off.—What is here advanced respects an acknowledgment of great property in *dirms*.—But if he should have said “I owe great property of *deenárs*,” then the amount due is fixed at twenty *Miskáls*. In *camels* it is *twenty-five*; because the smallest *Nisáb* of camels upon which a camel is due in *Zakát*, is *twenty-five*‡.—In all property not subject to *Zakát*, the explanation is required to amount to a *Nisáb* with respect to the *value* §; that is to say, if the acknowledger explain to the *value* of a *Nisáb* his acknowledgment is to be credited; but if to *less*, it must be rejected.—If the acknowledger should say “I owe large properties,” the smallest specification that can in that case be admitted is three *Nisábs*, of that species of property to which the acknowledgment relates; because the word *properties* is *plural*, and the smallest degree of plurality is *three*.

less than what constitutes a *Nisáb* in the property to which it relates.

Acknowledgment made in the name of an owner of a property (in the case of a *theft* or *robbery*) is valid.

Cases of acknowledgment relating to *many* *dirms*.

If a person should say “I owe many *dirms*,” his explanation is not admitted to an amount short of ten *dirms*, according to *Haneefa*.—The two disciples maintain that it is not to be admitted to an amount

* See Vol. I. p. 2.

† See Vol. II. p. 84.

‡ Upon which a *Zakát* is paid of a yearling camel's colt. (See Vol. I. p. 11.)

§ See Vol. I. p. 25, and 27.

short

short of *two hundred*; because a proprietor of a *Nisab* (namely, two hundred *dirms*) is held to be *opulent*,—(not one who is possessed of a *smaller number*,) whence it is that the proprietor of a *Nisab* is required to aid and assist others, and not he who is possessed of a *smaller number*.—The reasoning of *Haneefa* is founded upon principles peculiar to the *Arabic language*.

OR TO DIRMS,
generally.

If the acknowledger should say "I owe *dirms*," he is supposed to mean *three*, as that is the least number of *plurality*. But if he should himself explain a *larger number*, it must be admitted, as the word *dirms* may be applied to any number.—The weight of the *dirms* must be estimated from what is customary*.

SECTION.

Acknowledgment made in favour of an embryo (in virtue of bequest or inheritance) is valid,

provided the birth take place within a probable period;

If a person say "I am bound, for a thousand *dirms*, to the conception in the womb of a certain woman;" and afterwards add that "the said sum is due in virtue of a bequest of a particular person,"—or that "it is the right of the conception in virtue of inheritance from its parent,"—the acknowledgment so made is valid, in as much as it relates (in these instances) to a cause which is fit and adequate to the establishment of a right to property in a conception.—If, therefore, the woman should afterwards bring forth a living child within such a period as evinces the conception to have existed in the womb at

* A considerable portion of the text which immediately follows has been omitted by the translator, as the cases which it contains, relating entirely to verbal criticism, cannot easily be translated, and are such as belong more properly to the province of *grammarians* than of *lawyers*.

the time of the acknowledgment, the acknowledger is bound to the child for a thousand *dirhms*.—If, on the other hand, the woman should bring forth a *dead* child, the acknowledgment in that case relates to the *testator* or the *inheritor*, and the amount of it must accordingly be divided amongst their heirs; because the acknowledgment was in reality in favour of the *testator*, or the *inheritor*, and was to vest in the offspring only on condition of its being born *alive*, which did not afterwards take place.—If the woman should bring forth *two* living children, then the thing acknowledged must be divided equally between them.

and if the embryo prove still born, the thing acknowledged must be divided among the heirs or, if *living* be born, it must be divided between them.

If a person say “I am bound to the conception of a certain woman for a thousand *dirhms*, being the price of an article I purchased from the said conception,” or “being money borrowed from it,”—no obligation rests upon the acknowledger, as he explained it to arise from a cause which could not have happened, since a conception is incapable of either *lending* or *selling*.

but if such acknowledgment be ascribed to an impossible cause, it is null;

If a person acknowledge his being bound to a conception, without specifying the cause, such acknowledgment (according to *Abou Yoosaf*) is invalid.—*Mohammed* maintains that it is valid; for, as acknowledgment is *proof*, it is necessary to fulfil it as far as may be practicable; and it is practicable to fulfil it, in the present instance, by construing the cause to have been such as was competent to the establishment of a right of property in the conception.—The argument of *Abou Yoosaf* is that an acknowledgment, when absolute, is construed to be in virtue of *traffic*; (whence it is that the acknowledgment of a privileged slave, or of one out of the two partners by reciprocity, is understood to be an acknowledgment founded upon *traffic*;) the case, therefore, is the same as if the acknowledger had expressly specified the cause to be *traffic*;—and as that would have been invalid, so also is it invalid where the cause is understood to be such from implication.

and so also, if it be made without specifying any cause.

If

Acknowledgment relating to a thing existing, but not yet produced, is valid.

Acknowledgment of a debt, under a condition of option, is valid, and the condition becomes null.

If a person acknowledge the conception of a female slave, or the offspring of a goat, to be due to another, such acknowledgment is binding; since it would have been valid if he had *bequeathed* either of these, and his intention is therefore construed to be such.

If a person should make acknowledgment that "he owes another a thousand *dirms* upon an optional condition," (in other words, if he should say "the said amount is due by me (or, *from me*), but I have an option of three days,")—the condition of option is in this case null, since optional conditions are instituted with a view to *annulment*, whereas an acknowledgment is a notification or avowal, which is binding; the acknowledgment, therefore, is in this case binding, and is not rendered null by the nullity of the condition.

CHAP. II.

Of Exceptions; and what is deemed equivalent to Exception*.

The exception of a part of the thing acknowledged is valid, if immediately joined

If a person make an acknowledgment of a thing in favour of another, adding an exception of *part* of the thing so acknowledged, such exception is valid; and the acknowledger becomes bound for the remainder, whether the exception be *great* or *small*; provided, how-

* "What is deemed equivalent to exception,"—that is, *reservation* of any kind, &c.

ever, that it be immediately joined to the acknowledgment*.—If, on the contrary, he except the *whole* of the thing acknowledged, the acknowledgment is in that case binding, and the exception null; because this is in fact a *retractation*, not an *exception*; for *exception* supposes the remainder of a part after the deduction of the thing excepted from the whole; but after the deduction of the whole there is no remainder: it is therefore a retractation, and consequently null.

with the acknowledgment:

but if the *whole* be excepted, the exception is not attended to.

If a person say "I am bound to a certain person for a hundred *dirms*, with the exception of one *deenar*," (or "of one *Kafeez* of wheat †,") then, according to the two disciples, he is bound for a hundred *dirms*, with the exception of one *deenar*, (or of one *Kafeez* of wheat.)—If, on the contrary, he should say "I owe a hundred *dirms*, with the exception of one piece of cloth;" the exception so made is *not* valid.—*Mohammed* maintains that the exception is invalid in both cases.—*Shafei*, on the other hand, holds that in both cases it is valid.—The argument of *Mohammed* is that an exception means a deduction from the thing mentioned in the preceding part of the sentence, which cannot be established where the thing excepted is not of the same genus with the thing from which it is excepted. The argument of *Shafei* is that the thing excepted, and that from which the exception is made, are of one and the same genus, as being both *valuable*.—The argument of the two disciples is that in the *former* instance, the thing itself, and the exception from it, are of the same genus, as they are both price:—*deenars* are evidently so:—and things estimable by weight, or by measurement of capacity, are so likewise, according to their qualities;—in other words, they become so upon their qualities being explained.—In the *second* instance, on the con-

The exception must be homogeneous with the acknowledgment; otherwise it is invalid.

* That is, that it be expressed in the same sentence with the acknowledgment.

† Grain is united with money in accounts, both being considered as of the same genus, since both are equally price, (that is, standards of value,) and may be equally used to represent property. (See *Partnership*, note, Vol. II. p. 309.)

trary, (where the exception is *cloth*,) the thing excepted, and that from which the exception is made, are of different genus, as cloth is not price in any shape, neither in respect of itself, nor in respect of its description or quality; and accordingly, cloth is not due in any contract of exchange, excepting that of *Sillim*;—(that is, where the price is advanced to the seller beforehand.)—Now whatever is *price* has this fitness, that it may be set in comparison with *dirms* or *deenars*, and may consequently, in a proportionate degree, be excepted from them;—whereas, on the other hand, whatever cannot be stated as price has not a fitness of being compared with *dirms* and *deenars*, and consequently cannot be stated as an exception from them, since the proportion cannot be ascertained.

A reservation of the will of God renders the acknowledgment null.

If a person make an acknowledgment, with this proviso “if it please God,” he is not then liable for any thing; because (according to *Abou Yoosaf*,) a reservation of the pleasure of God is either an *annulment* of the acknowledgment, or a *suspension* of it; and the acknowledgment is null on either supposition:—or, because (as *Mahammed* argues) it is equivalent to an acknowledgment suspended upon a condition, which is null, as an acknowledgment does not admit of being suspended on a condition, since acknowledgment is an *avowal*, which cannot be made conditional; for if it be *true* it cannot be rendered false by a default of the condition; or, on the contrary, if it be *false* it cannot be rendered true by the fulfilment of the condition:—or, lastly, because the acknowledgment is suspended on a circumstance which it is impossible to ascertain.—It is otherwise where a person says “I acknowledge a hundred *dirms* to be due by me to a particular person on my death,”—or “upon the arrival of a particular month,”—or “upon the festival of breaking Lent,”—because in these cases the acknowledgment is not suspended upon a condition, as this is merely an explanation of the time, and is therefore a *postponing* of the thing acknowledged, and not a *suspension*; whence it is that if the person in

in whose favour the acknowledgment is made can prove the fallacy of the postponement, the thing becomes due to him immediately.

If a person make an acknowledgment of a *house* in favour of another, and except the *foundation*, both the house and the foundation are the right of the person in whose favour the acknowledgment is made; because the foundation is included in the house from its *dependancy*, and not from its being comprehended in the word *house*; and an exception is valid only where it relates to something *comprehended* in the thing expressed, according to the meaning of the word. It is to be observed that the stone in a ring, or the trees of an orchard, stand in the same relation to the ring or the orchard as the foundation does to a house, because neither the word *ring* nor *orchard* applies to the *stone* or the *trees*, but are both included merely as *dependants*. It is otherwise where a person makes an acknowledgment of a house in favour of another, excepting from it an *indefinite portion*, or a *specific apartment*, as the exception in these cases relates to a thing which is comprehended in the word *house*.

In an acknowledgment regarding a *house*, an exception of the *foundation* is invalid.

If a person say "the foundation of this house belongs to me, and the *Sibn* (meaning the *court-yard*) to a particular person;" then the person in whose favour the acknowledgment is made is entitled to the court-yard, and the foundation is the property of the acknowledger. It is therefore, in fact, the same as if the acknowledger had declared that "all the ground free of building is the property of such a person." It would be otherwise if, instead of *Sibn*, he were to mention the word *Arz*, [*earth*,] for in that case the foundation as well as the house would become the property of the person in whose favour the acknowledgment is made; because an acknowledgment of the *ground* is an acknowledgment of the *foundation*, as much as an acknowledgment of the *house itself*; for the *ground* is the *original* thing, and the foundation is included along with it as a *dependant*.—In an acknowledgment of the *ground*, therefore, the foundation is included as a

An exception of the *court-yard* of a house is admitted.

dependant, in the same manner as it would be included in the house itself; and hence the exception is invalid.

A reservation of non-delivery of the article is done away by the delivery of it to the acknowledger;

If a person acknowledge a debt of a thousand *dirms* to another, as the price of a slave which he had purchased from that other, but which he had not received from him, in that case, if the slave be specific, (as if he had said, "as the price of *this* slave,") the person in whose favour the acknowledgment is made must be desired to deliver up the slave and receive a thousand *dirms*, on pain of forfeiting his claim.—The compiler of the *Hedaya* remarks that this case admits of several statements.—I. That which has been already made, and which proceeds on the supposition of the acknowledger's assertion of the purchase and the non-delivery being verified by the person in whose favour the acknowledgment is made; and in which the law stands as above expounded, because the mutual agreement of the parties is equivalent to *actual inspection*.—II. Where the person in whose favour the acknowledgment is made denies the sale of the particular slave alleged by the acknowledger, and declares that "the slave in question is his property, and it is *another* slave he sold to him;"—in which case the acknowledger is liable for the amount; since he acknowledges a sum due, on the supposition of the existence of a slave which he had purchased; and consequently upon the other person's declaration of the existence of the slave sold, he becomes liable for the amount.

OBJECTION.—It would appear that the acknowledger is not responsible for the amount, since he acknowledges his debt of a thousand *dirms* for the purchase of a specific slave; whereas the person in whose favour the acknowledgment is made claims the said debt for the sale of *another* slave.—Now as acknowledgment is binding only from the particular cause which is assigned for it, and the cause in this case is contradicted by the person in whose favour the acknowledgment is made, it follows that the acknowledgment is not valid.

REPLY.

REPLY.—The contradiction, with respect to the *cause*, after their mutual agreement as to the existence of the *obligation*, is of no effect. Thus if a person acknowledge his responsibility to another for a thousand *dirms*, as “for goods purchased from him,” and the person in whose favour the acknowledgment is made assert the obligation in question to have arisen from *usurpation* or *loan*, still the acknowledger is responsible for the amount: and so also in the case in question.—

—III. Where the person in whose favour the acknowledgment is made declares the slave in question to be his own property, and *denies* his having sold him; in which case the acknowledger is exempted from any obligation, because he has acknowledged the property to be due only as *in return for the slave*, and consequently, without that, it is not due from him.—If, however, in this case, the person in whose favour the acknowledgment is made should further declare that “he had sold *another* slave to him [the acknowledger,]” both parties must be sworn; because they are both defendants, as they reciprocally deny the assertions of each other:—and upon each taking an oath, the obligation involved in the acknowledgment is annulled, and the slave remains with the person in whose favour the acknowledgment was made.—What is here advanced proceeds on a supposition of the slave being *specific*: for if a person acknowledge a debt of a thousand *dirms*, due to another, for a slave that he had purchased from him, without specifically describing the slave, the acknowledger is in that case responsible for a thousand *dirms*:—and his assertion, that “he had not received the slave,” is not to be regarded, according to *Haneefa*, whether he connect such assertion with his acknowledgment, or make it separately; because such assertion is a retraction of his acknowledgment; for this reason, that in acknowledging a thousand *dirms* to be due from him, he assumes an obligation to that amount; and his denial of the receipt of the indefinite slave is repugnant to this obligation, as the price is not due for an indefinite slave, because of the uncertainty;—and this, whether the uncertainty be interwoven in the contract, (as where a person purchases one out of two slaves,) or

but in case of a disagreement with respect to the article, both parties must be sworn.

If the article be not *specific*, the reservation is not regarded.

supervient upon it, (as where a person purchases a specific slave out of a great number, and afterwards both the buyer and the seller forget the slave that had been purchased;) because the uncertainty is a bar to the delivery, since the purchaser may always deny whatever slave is produced by the seller to be the one purchased: the uncertainty, therefore, is a bar to the obligation of the price; and such being the case, the acknowledger, in denying the receipt of the slave, virtually retracts his acknowledgment, which is not allowed.—The two disciples allege that if the person in whose favour the acknowledgment is made should verify the acknowledger's assertion, by declaring the debt of one thousand *dirms* to be due for *the price of a slave*, the acknowledger's declaration of his not having received the slave is in that case to be credited; nor is any thing whatever due from him, whether such declaration have been conjoined with the acknowledgment, or otherwise.—But if the person in whose favour the acknowledgment is made *contradict* the acknowledger, with respect to the debt being for the price of a slave, asserting it to be due for some other goods, then the acknowledger's declaration of his not having received the slave is not to be credited, unless it be conjoined with the acknowledgment. Their reasoning in support of this opinion is that the acknowledger having acknowledged the obligation of the debt upon himself, and having explained the cause of it, (namely, *sale*,) it follows that if the person in whose favour the acknowledgment is made verify his declaration, so far as relates to the *cause* of the obligation, the sale is fully proven and established: the obligation, however, towards the discharge of the debt, can be established only by the receipt of the subject of the sale; and as this is denied by the acknowledger, his assertion is therefore credited.—If, on the other hand, the person in whose favour the acknowledgment is made should contradict the assertion of the acknowledger in regard to the *cause* of obligation, then the acknowledger's explanation of the cause may be regarded as a modification, (that is, he by it modifies the tenor of the first part of his speech;) because the tenor of the first part of his speech goes to
shew

shew that an obligation is at present actually operating upon him; whereas the latter part, in denying the receipt, tends to prove that no obligation subsists, since the obligation to pay is not established till after the receipt: the last part of the speech, therefore, is an explanatory modification; and a modification is not admitted unless it be conjoined with the acknowledgment.

IN a person acknowledge the purchase of an article from another, at the same time declaring that "he has not yet received it," his assertion must in that case be credited, according to all our doctors; because he has merely acknowledged a *contract of sale*; and an acknowledgment of *sale* is not an acknowledgment of *receipt*, since a receipt does not necessarily follow a conclusion of sale.—It is otherwise where a person acknowledges the obligation of the *price* of an article purchased; for in that case his assertion of *non-receipt* is not approved, as payment of the price is not obligatory until after the receipt of the goods.

A reservation of non-receipt of the thing acknowledged must be credited.

IF a *Mussulman* declare that "he owes such a person a thousand *dirms*, on account of *wine* or *pork*," he is bound for the thousand *dirms*:—and his explanation of the *cause* is not admitted, according to *Haneefa*, whether it be conjoined with the acknowledgment, or otherwise; because it is a retraction of his acknowledgment, as the price of *wine* or *pork* cannot be obligatory on a *Mussulman*; and in the preceding part of his speech he expressly declares the existence of an obligation upon him to the amount stated. The two disciples allege that if the explanation be conjoined with the acknowledgment, nothing is due from the acknowledger, since the latter part of his speech evidently shews this to have been his meaning; it being in fact the same as if he had added "*if it please God*."—To this, however, it may be replied, that there is no analogy between the two cases, as a reservation of the *pleasure of God* is a suspension of the matter upon a condition of which it is impossible to obtain a knowledge. Besides, the

A reservation of the cause of obligation being illegitimate does not annul the acknowledgment.

the suspension on a condition is a *modification*, and consequently admissible, provided it be conjoined with the speech: in opposition to an acknowledgment of the *price* of wine or pork, which is not a suspension, but an annulment of the acknowledgment, as has been already explained.

An exception with respect to the quality of money acknowledged to be due, is set aside by the counter-assertion of the person in whose favour the acknowledgment is made:

If a person declare that "a thousand *dirms* are due from him to such a person, as the price of certain effects," or "on account of a loan;" and afterwards allege the said thousand *dirms* to be *Zeyf*, or *Binbirja*, or *Satooka*, or *Arzeex*, and the person in whose favour the acknowledgment is made allege them to be *feed**, in that case, according to *Haneefa*, the acknowledger is responsible for *feed dirms*, whether his latter assertion be conjoined with his prior declaration, or otherwise.—The two disciples maintain that the latter assertion of the acknowledger is to be credited, in case only of its being conjoined with the former, and not otherwise.—The same difference of opinion obtains where a person declares that "he owes another a thousand *dirms*," adding that "they are *Zeyf*," or that "another has lent him a thousand *dirms*, but that they are *Zeyf*," or, that "he owes another a thousand *dirms* on account of certain goods, but that they are *Zeyf*."—(*Zeyf dirms* are such as are not accepted at the public treasury, but which pass amongst merchants: the *Binbirja* is of a kind still worse, which does not pass amongst merchants; and the *Satooka* and *Arzeex* are the worst of all, and in which the mixture of base metal preponderates.) The argument of the two disciples is that the above explanation is a *modification*, and is consequently valid if conjoined, in the same manner as a *condition*, or an *exception*; for the word *dirm* is literally applicable to *Zeyf*, and metaphorically to *Satooka*: the acknowledger's declaration, therefore, of their being *Zeyf* or *Satooka* is merely a modification, in the same manner as if a person should

* Pure money, of the current standard. The other descriptions are explained a little further on.

declare

declare that "he owes a thousand *dirms*, but of such a kind that ten of them weigh five *miskáls*. The reasoning of *Haneefa* is that his assertion of their being *Zeyf* or *Satooka* is equivalent to a retraction: for an absolute contract presupposes *dirms* free from defect; whereas *Zeyf* and *Satooka* are both defective. Now the plea of a defect is a retraction of part of the obligation involved in the acknowledgment; and the case is therefore the same as if the seller of a thing should say to the purchaser of it, "I have sold you a thing with a defect, of which you were apprized," and the purchaser deny his knowledge of the defect, in which case the denial of the purchaser is credited, as probability argues in his favour, since every absolute contract supposes a freedom from defect. Besides, *Satooka dirms* do not constitute *price*; and as a contract of sale is never concluded but for *price*, it follows that his explanation is, in effect, a *retraction*. (With respect to the case adduced by the two disciples of "an acknowledgment of a debt of a thousand *dirms*, accompanied with a declaration that the *dirms* due are of that kind of which ten are equivalent to five *miskáls*,"—it is to be observed, in reply, that the reservation is admitted, for this reason, that the acknowledger, in this instance, speaks with a reservation merely of the *degree* or *proportion* of the *dirms*, and to that the word *dirms* applies.—It is otherwise in a description of the *goodness* of the *dirms*, for as to this the term *dirms* does not properly apply, it is not considered as a reservation, any more than the exception of the foundation of a house.)—The case is different where a person acknowledges that he is indebted to another a *Koor* of wheat, as the price of a slave, but that the wheat is of a *coarse* kind; because *coarseness*, with relation to *wheat*, is not a *quality* but a *species*, and an absolute contract does not necessarily require that the wheat be other than *coarse*.—It is related as an opinion of *Haneefa*, in other books than the *Zábir Rawáyet*, that in a case of *borrowing*, the acknowledger's assertion of the *dirms* being *Zeyf* ought to be credited, provided this assertion be conjoined with the acknowledgment; because the act of borrowing is not complete until after the seizure of the borrower; and

but not when the exception relates to the *species* and not to the *quality*.

it often happens that *dirms* are *Zeyf* in borrowing, in the same manner as in usurpation. The reasoning of the *Zâhir-Rawâyet* is that the common custom is to deal in good *dirms*, and therefore when the explanation is *absolute*, good *dirms* must be understood.

An exception with respect to the quality is admitted, if the *cause* of the obligation be not mentioned by the acknowledger;

If a person acknowledge that he owes another a thousand *Zeyf dirms*, but without reciting the *cause*, (such as *sale* or *loan*,) some authorities say that his assertion with respect to the *quality* of the *dirms* is to be credited, according to all our doctors. Others, however, allege that, according to *Haneefa*, it is not to be admitted, because, as the acknowledgment is *absolute*, it may relate either to *legal* contracts, or to acts of violence, such as usurpation or destruction, which are *illegal*;—and the *former* supposition is adopted, as acknowledgment is rather to be attributed to a *lawful* than to an *unlawful* cause.

and also where it is mentioned, if it be either *usurpation* or *trust*.

If a person acknowledge his having usurped a thousand *dirms* from another, or his having received them in deposit; and afterwards assert that the said *dirms* were *Zeyf* or *Binbirja*; in that case his assertion must be credited, whether it be conjoined with or separate from the acknowledgment; because mankind are accustomed to usurp whatever they can find, and to place in deposit whatever they possess*; and therefore neither of these acts necessarily infers the *dirms* to have been *jeed*, (that is, *good*.) The acknowledger's assertion, therefore, of the *dirms* being either *Zeyf* or *Binbirja* is equivalent to an explanation of the species, and is consequently admitted, even though it should not have been conjunctively made.—For the same reason, also, if an usurper produce a defective article, as the thing he had usurped,—or a trustee produce a defective article, as the thing he had received in deposit,—the declaration so made must in either case be admitted.—It is reported, from *Abou Yoosaf*, that in case of an acknowledgment of usurpation, the acknowledger's assertion, of the *dirms* being *Zeyf* ought

* Without any regard to the *species* or *quality*,

not to be credited where it is made separately from the acknowledgment; because of the analogy of this case to that of a loan, on the principle of feizin inducing responsibility in both cases, that is, in a case either of usurpation or of loan;—for he holds that, in a case of loan, the acknowledger's assertion of the money borrowed being *Zeyf* cannot be credited, if separately made; and so also in the case in question.

If a person acknowledge his usurpation of a thousand *dirms*, or his receipt of that sum, in deposit, and assert that they were *Satooka*, in that case his assertion must be credited, if conjoined with the acknowledgment; but not otherwise; because, although *Satooka* be not in reality a species of *dirms*, still it is customary to apply that word to them *figuratively*:—the mention of this term, therefore, is a *modification*, and must consequently be *conjoined*.

If a person declare that “he owes such an one a thousand *dirms*,” “on account of certain goods,” or that “he has borrowed a thousand *dirms*,” or that “he has received a thousand *dirms* in deposit,” or that “he owes a thousand *Zeyf dirms*,” or that “he has usurped a thousand *dirms*,”—and he afterwards except a particular number of *dirms* from the obligation,—in none of these cases is his assertion to be admitted, if made separately from the acknowledgment,—whereas if it be conjoined with the acknowledgment it must be admitted, as the assertion is in this case an *exception*, and an exception is valid when conjunct. It is otherwise if he assert the *dirms* to be *Zeyf*, as a reservation of this nature is not valid, since *Zeyf* relates to *quality*; but expression applies solely to *quantity*, not to *quality**; and exception is not admitted with respect to any matter but what may be precisely expressed. It is to be observed, however, that if the exception

Acknowledgment with respect to the deposit or usurpation of *Satooka dirms*.

An exception of a part from the whole is not to be credited, if made separately;

unless this arise from

* Meaning, perhaps, that *number* admits of a precise and definite expression, whereas *quality* can be ascertained only by *examination* and *inspection*.

some unavoidable accident.

should have been disjoined by necessity, (such as by a *cough*, or a *shortness of breath*,) it is then considered as *conjunct*, because of the interruption being *unavoidable*.

In an acknowledgment of *usurpation* a *damaged* article must be accepted.

Where the property is lost, if the *acknowledger* allege a *trust*, and the other party assert *an usurpation*, the *acknowledger* is responsible:

If a person acknowledge the *usurpation* of *cloth*, and then produce *damaged* cloth, it must nevertheless be admitted, as *usurpation* is not restricted to *perfect* things.

If *Zeyd* say to *Omar* "I took from you a thousand *dirms* by way of *trust*, and they are lost," and *Omar* reply "no; you took them by way of *usurpation*;" in that case *Zeyd* is responsible for the loss. If *Zeyd*, on the contrary, say "you gave me a thousand *dirms* by way of *deposit*, and they are lost," and *Omar* reply "no; you took them by way of *usurpation*;" in that case *Zeyd* is not responsible for the loss. The difference between these two cases is, that *Zeyd* (in the *former* case) first acknowledges a thing which is a cause of responsibility, namely, *taking*, and afterwards asserts an exemption from responsibility, by declaring that he held it as a *deposit*. Now a *deposit* implies the consent of *Omar*; but *Omar* denies his assent; and therefore, as *defendant*, his assertion supported by an oath must be credited. In the *second* case, on the contrary, *Zeyd* does not make any acknowledgment subjecting himself to responsibility; because, in using the word *given*, he refers the action to *Omar*, and not to himself; and no one is subject to responsibility for the actions of another. *Omar*, on the other hand, asserts, against *Zeyd*, a cause of responsibility, namely, *usurpation*; which *Zeyd* denies; and consequently, as *defendant*, his word supported by an oath must be credited.—It is to be observed that the word *receive*, in this case, is equivalent to *take*; and the word *remove* to that of *give*.—Thus, if the *acknowledger*, instead of *taken*, should say that he had *received* a thousand *dirms*, he is in that case subject to responsibility.—If, on the contrary, he say "you have *removed* to me," instead of "you have *given* me," he is not in that case subject to responsibility.

OBJECTION.

OBJECTION.—Neither giving nor removing can be carried into execution without receipt on the part of the other party. An acknowledgment of *giving* or of *removing*, therefore, is virtually an acknowledgment of *receiving*; and consequently it would appear that, in either case, the acknowledger is subject to responsibility.

REPLY.—The *giving* and *removing* of one thing to another is sometimes performed by a mere *relinquishment* of the right in an article, (that is, by a non-prevention of the other from taking it;) and sometimes by placing the article before the other.—*Giving* and *removing* may therefore be carried into execution without a *receipt* or *taking*; and hence an acknowledgment of giving or removing does not involve an acknowledgment of receiving or taking. Besides, admitting that receipt is established from *giving* or *removing*, still it is established only by *implication*; and whatever is established by implication is adopted only in cases of necessity; but there exists no necessity, in the present instance, to establish responsibility for the loss.

If a person say to another “I have *taken* a thousand *dirms* from you by way of *deposit*,”—and the other reply “no; you have taken them by way of *loan*,”—in this case the assertion of the acknowledger, notwithstanding his use of the word *taking*, must be admitted: for both parties are agreed in the taking of the *dirms* with the consent of the person in whose favour the acknowledgment is made; but *he* asserts a *loan*, (which is a cause of responsibility,) whereas the acknowledger asserts a *deposit*.—There is an evident difference between this case and that which has already been explained, in which the person in whose favour the acknowledgment is made asserts usurpation; because that person stands as *defendant*, since he denies his consent.

but not if he
assert a *trust*,
and the other
assert a *loan*.

If a person say “this sum of a thousand *dirms*, my property, was in trust with such a person, and as such I have taken it from him,”
and

Case of ac-
knowledge-
ment of the

receipt of money, with a reservation of its being the property of the *acknowledger*.

Case of acknowledgment of the receipt of *specific property*, with a reservation to the same effect.

and the other deny this, and declare the said sum to be *his own property*; he is in that case entitled to take it from the *acknowledger*; because the *acknowledger* confesses that he took the sum in question from him on the claim of its being *his own property*, which the other denies; and hence his assertion, as defendant, must be credited.

If a person affirm that he had hired out an animal of carriage to another, who, after riding upon him, had returned it to him,—or, that he had hired out a garment to another, who, after wearing it, had returned it to him,—and the other contradict this, declaring the said animal or garment to be his own property, in that case, according to *Haneefa*, the assertion of the *acknowledger* must be admitted, upon a favourable construction.—The two disciples maintain that the assertion of the other party must be credited; and this is agreeable to analogy.—(The same difference of opinion also obtains where, instead of *hiring out*, the *acknowledger* says that he had *lent* his horse to the other to ride on, or his house to reside in,—or, had given his garment to another *to mend*, for hire,—and had afterwards resumed the article, and the other declare it to be his property.—(Analogy would suggest (as has been already mentioned in the example of *deposit*) that the *acknowledger*, in these cases, has confessed his having taken and possessed himself of things which, however, he asserts to be *his own property*; but which is denied by the person in whose favour the acknowledgment is made; whose assertion, as defendant, must therefore be credited.—The reasons for a more favourable construction, in this particular, are twofold.—FIRST, the establishment of the *receipt*, in cases of *hire* and of *loan*, is not admitted from *itself*, but from *necessity*; (that is, from the necessity of answering the object of the contract, namely, the *usufruct* of the article;) and the effect is therefore restricted to the point of necessity. Hence the acknowledgment of *hire* or of *loan* does not involve the acknowledgment of *receipt*, as in the case of a *deposit*.—SECONDLY, as in the cases of hire, loan, and residence, the possession of the person in whose favour the

the acknowledgment is made is established solely by the avowal of the acknowledger, his explanation of the nature of that possession must be admitted. It is otherwise in the example of *deposit*, since a deposit may be made without a delivery; as where, for instance, a person's gown is blown, by the wind, into another person's house, in which case the gown remains a deposit with the owner of the house, although no formal delivery have been made. The author of this work observes that the point upon which the difference between the cases of *hire*, *loan*, or *residence*, and that of deposit, (as before explained,) turns, is not that the word *take* is recited in the *latter* and not in the *former* cases; because this word is used by *Mohammed*, in the case in question, in the *Mabsoot*, treating of acknowledgments;—but that it rests upon the two reasons for a *favourable* construction of the law in this particular, as recited above.

If a person say “I have received from such a person his acquittance, of a thousand *dirms* which he owed me,”—or “I lent such a person a thousand *dirms*, and have received back the same,”—and the other deny the previous existence of the debt, our doctors are, in that case, unanimously of opinion that the assertion of the person in whose favour the acknowledgment is made is to be credited; because a debt must be discharged by means of a similar; and this cannot otherwise be accomplished than by the creditor's receiving a portion of the debtor's property, equivalent to the debt, in such a manner as may induce responsibility.—The acknowledger, therefore, in saying that he had received from the other an acquittance of the debt which that other owed him, confesses a circumstance which is a cause of responsibility; and he afterwards claims the right of property in the same, in virtue of its having been given to him in exchange for his debt, which is denied by the other; he therefore stands as defendant, and his assertion must consequently be credited.—It is otherwise in assertions of *hire*, *loan*, or *residence*, because the thing seized, in those instances,

is an identic article, for which the acknowledger claims the *hire*, or so forth: there is therefore an evident difference between the cases.

Case of dispute with respect to immoveable property.

IF a person acknowledge that another has cultivated a particular piece of land, or built a particular house, or planted grapes in a particular orchard, the said land, house, or orchard being in the possession of the acknowledger, and the person in whose favour he acknowledges claim the *property* of these things, and the acknowledger, on the other hand, declare them to be *his own* property, and that the other, in the *cultivation, building, or planting*, had only acted by *his desire*, as his *assistant*, or as his *hireling*—in that case the assertion of the acknowledger must be credited, according to all our doctors; because he does not make an acknowledgment of the possession on behalf of the other, but merely of the abovementioned acts as performed by that other, and these do not argue a right of possession, since the person in whose favour the acknowledgment is made might have lawfully performed these acts upon things that were in the possession of the acknowledger. The case, therefore, is the same as if a person were to declare that a particular taylor had sowed his garment for half a *dirm*, but that he had not received the garment from the taylor; and the taylor claim the property of the garment: for there the acknowledgment so made is not supposed to allude to the possession on the part of the taylor, and therefore the assertion of the acknowledger is credited; and so also in the case in question. It is otherwise if the acknowledger say that “he has received possession from the taylor;” for concerning that case there is a disagreement amongst our doctors, similar to what has been described.

CHAP. III.

Of Acknowledgments made by Sick Persons*.

IF a person, in his last illness, acknowledge a debt, as being due to another, and he also owe other debts contracted during *health*, or debts contracted during his *sickness* for *known causes*, (such as the *purchase* or the *destruction* of property,) and of which proof may be obtained by other means than through his acknowledgment, or be indebted to his wife married during his sickness, for her *Mahr-Mist*, (or *proper* dower,)—all these debts so contracted during health or sickness have a preference to that other which he so acknowledges during his sickness, and of which the cause is unknown. *Shafëi* maintains that the debts of the healthy and the sick are alike valid, since acknowledgment, which is the cause of both, is in both instances equal, in as much as it is derived from the understanding. *Debt*, moreover, and the *responsibility of the person* to which the obligation relates, are capable of comprehending the rights of a variety of persons. An acknowledgment of debt, therefore, resembles the settlement of a contract of purchase or of marriage;—that is to say, if a sick person purchase goods, and remain indebted for the price,—or marry on a proper dower, and remain indebted for the same,—debts so contracted are upon an equal footing with debts contracted during health; and so also in the case in question.—The argument of our doctors is that acknowledgment is not valid when it tends to prejudice the right

Debts acknowledged on a death-bed (without assigning the cause of them) are preceded by debts of every other description.

* By *sick* persons, throughout the whole of this chapter, is meant such as are affected with a mortal disorder.—(The analogical principle on which the law upon this head proceeds is set forth in treating of the *divorce of the sick*.—See Vol. I. p. 279.)

of another; and the acknowledgment of a sick person *does* induce this consequence, since the rights of the creditors of debts contracted during his health are connected with his property, in as much as they may seize it for the payment of what is owing to them;—whence it is that deeds of a *gratuitous* or *benevolent* nature are not allowed, in a sick man, beyond the extent of a third of his estate.—It is otherwise with respect to marriage on a *proper* dower*, as marriage is one of the most essential wants of a sick person, since in the same manner as man is impelled to *his own* preservation, so also is he impelled to the propagation of his species.—It is otherwise, also, with respect to the purchase of property for an equivalent price; because the right of the creditors is connected with the *substance* of the property, and not with the *form* of it; and in an instance of purchase the substance is extant.—During health, moreover, the right of the creditors is connected with his *person*, not with his *property*, since whilst he is in a condition to acquire property, it is supposed that the property will increase:—a state of sickness, on the contrary, is a state of inability, and therefore the right of the creditors is then connected with his property†.

OBJECTION.—If the connection of debts contracted during health, with the property of the sick person, be a bar to the obligation of other debts, because of the priority of the former, it follows that if a sick person, having made an acknowledgment in favour of a person, should afterwards make an acknowledgment in favour of another, it is not valid, because the first acknowledgment is preferable, as being connected with his property; whereas, according to law, they are both valid.

REPLY.—The whole period of sickness is considered as one and the same, because the whole of it is a time of restriction, and there-

* That is to say, without any *particular specification* of a dower: for if a sick person marry upon a *specified* dower, the agreement holds to the extent only of *one third* of his whole property.

† What is here said merits some attention, as it elucidates a very important point in the laws of property.

fore *one* part or period of it is the same as *another*.—It is otherwise with respect to *health*, as health is not a period of restriction, and therefore deeds are then lawful, whereas, sickness being a time of restriction, many deeds are then unlawful.

—It is to be observed that debts contracted during sickness, of which the cause of the obligation is known, are preferable to debts of sickness which are supported merely upon acknowledgment; because the former are free from suspicion. It is also to be observed that debts of sickness, of which the cause is *known*, are upon a foot of equality with debts of *health*, neither having a preference over the other;—a debt of a *proper* dower, because of the necessity for marriage; and debts contracted on account of purchase, or of a loan, because of the existence of an equivalent.—The right of the creditors, moreover, is connected merely with the *substance*; and as, in the establishment of these debts, there is no doubt or suspicion, they are therefore on a foot of equality with debts of health.

If a sick person make an acknowledgment in favour of any person, of something he holds in his hand, such acknowledgment is not valid, because of the injury it induces to the creditors, whose right is connected with that thing.

A dying person cannot concede any specific property by acknowledgment;

It is not lawful for a sick person to discharge the debts of *part* of his creditors, because such partial discharge is a destruction of the right of the others: and in this respect the creditors of *health* and of *sickness* are upon an equality:—excepting, however, where the sick person restores something he may have borrowed during his sickness, or pays the price of something he may have purchased during his sickness; and the obligation admits of being proved by witnesses:—in other words, if a person borrow, during his last illness, a thousand *dirms*, and keep the same by him, or purchase any thing with them to that value, and afterwards repay the loan, or pay the price of the purchase, it is lawful, where it admits of being proved by evidence, because

nor make a partial discharge of his debts: (excepting those contracted during his illness.)

these payments are attended with no injury to the creditors, as the acknowledger has obtained an equivalent for what he pays.

A debt acknowledged upon a death-bed is discharged after all other debts.

IF, after the discharge of the whole of the *preferable* debts, there still remain some property of the sick man's estate*, such residue must be applied to the discharge of the debts acknowledged during his sickness; because such acknowledgments were in themselves valid, and having been annulled merely from a regard to the rights of the creditors, they resume their original validity when the bar to their operation is removed.

If there be no other debts, it is discharged previous to the distribution of the inheritance.

THE acknowledgments of debt, by a sick person, who does not owe any debts of health, are valid, as they occasion no injury to others.—In such case, also, the said debts are preferable to the claims of the heirs; because *Omar* has said, “whenever a sick person acknowledges debts, they must be considered as obligatory, and discharged from his effects.”—Besides, the discharge of his debts is a matter of necessity; and the right of the heirs is connected with his estate on the sole condition of its being *free from incumbrance*; whence it is that the discharge of the funeral expences precedes the right of the heirs, as that is also a matter of necessity.

An acknowledgment in favour of an heir is not valid, unless admitted by the co-heirs;

IF a sick person make an acknowledgment in favour of any of his *heirs*, it is not valid, unless it be verified by the other heirs.—*Shafar*, in one report of his opinion upon this point, says that it is valid; because acknowledgment is the manifestation of an established right; and the probability is that the acknowledger has spoken truth, since reason forbids falsehood, more particularly in time of sickness.—Besides, as religion and justice, when joined to reason, must restrain a man

* This case supposes a distribution of the effects of the acknowledger, after his decease; and the term *sick man* is applied to the defunct, in this instance, merely to distinguish him, as having acknowledged debts whilst he was sick of a mortal illness.

from falsehood, the acknowledgment of a sick person in favour of his *heir* is like an acknowledgment in favour of a *stranger*;—or, like an acknowledgment in favour of an *additional* heir,—(as if a person should acknowledge that “a particular person is his son,”—which acknowledgment is valid, notwithstanding it diminish the rights of the other heirs;)—or, like an acknowledgment of the destruction of a deposit, the property of an heir; (as where, for instance, a person lodges a deposit of one thousand *dirms*, during either health or sickness, with his father, in the presence of witnesses, and the father afterwards, whilst dying, acknowledges that he had destroyed the deposit of his son,—in which case the acknowledgment is valid, and the person in whose favour it is made is entitled to a thousand *dirms* from the estate of the acknowledger, although it diminish the right of the heirs;—and so also in the case in question.)—The arguments of our doctors upon this point are threefold.—FIRST, the prophet has said “*there is no legacy to an HEIR, and no acknowledgment of a DEBT in favour of an HEIR.*”—SECONDLY, as the right of the heirs is connected with the property of a person in his last sickness, (on which account he is not permitted, at that period, to do any deed of gratuity or affection,) an acknowledgment in favour of *some* of the heirs is invalid, as being prejudicial to the right of the *others*.—THIRDLY, as the sick person, in his last illness, is above the want of his property, and as affinity is the cause of connecting the right of the whole of the heirs with the property, when the want of it no longer exists in the sick person, it follows that at such period an acknowledgment in favour of a part of them must be an injury to the whole. This connexion, however, does not operate with respect to *strangers*, because of the necessity the sick man was under, during health, of entering into concerns * with them; for many of the concerns of the sick (such as *purchase, sale, and the like*) are entered into with strangers during

* Arab. *Moalikât*; meaning concerns of a *suspended* nature,—such as purchase with a suspension of payment of the *price*, and so forth,

health;

health; and if their acknowledgment of these during their sickness were not valid, people would be cautious of dealing with them during their health, and their affairs would of consequence suffer.—Such an acknowledgment, therefore, is preferable to the claims of the heirs.—It is to be observed that the connexion here mentioned does not operate to the destruction of a sick man's acknowledgment of parentage, by which an additional heir is occasioned; because the sick man also is necessitous in this particular, as parentage exists after death, and a man is held to continue in existence, after death, in the person of his offspring; whence parentage is one of the wants of the dead.

and so also of
an acknow-
ledgment in
favour of a
part of the
heirs.

If a sick man make an acknowledgment in favour of *part* of his heirs, and the others verify the same, such acknowledgment is valid, because of the removal of the only obstacle, namely, the connexion of the right of the other heirs with his property, which they themselves relinquish.

The acknow-
ledgment of a
dying person
in favour of
a stranger is
valid, to the
amount of the
whole estate:

If a sick person make an acknowledgment in favour of a stranger, it is valid, although it be tantamount to the whole of his property,—because Omar has said “*the acknowledgment of debt by a sick person is valid; and the debt is due from the whole of his estate;*”—(as before quoted.)—Analogy would suggest that the acknowledgment does not operate in a degree beyond the *third* of his property; as it is in that degree only that the LAW admits of the deeds of a sick man with regard to his property.—Our doctors, however, remark upon this that as the *acts* of a sick person are valid with respect to a third of his property, it follows that the *acknowledgment* of a sick person is valid in the same proportion; and it then becomes valid with respect to the remaining thirds also; because, upon the sick person acknowledging one third of his property to belong to another, it becomes from that moment the property of that other; and as the remaining two thirds then form the whole of the property of the acknowledger, he may lawfully make

make an acknowledgment of one third of it, and so on, until nothing remain.

OBJECTION.—It would hence appear that bequest to the extent of the whole property is also valid.

REPLY.—In bequest, the third of the estate does not become the property of the legatees, until after the death of the testator; and accordingly, they cannot claim their legacies before that event. It is otherwise with respect to an acknowledgment of debt, as the person in whose favour the acknowledgment is made becomes immediate proprietor.—There is therefore an evident distinction between the cases.

If a sick person make an acknowledgment in favour of a stranger, and afterwards declare that “he is his son,” the parentage is established accordingly, and the acknowledgment is null.—If, on the contrary, a sick person make an acknowledgment in favour of a strange woman, and afterwards marry her, the acknowledgment does not become null. The difference between these two cases is that, in the *former*, upon the sick person declaring the other to be his son, his parentage is established in the acknowledger from the instant of conception in the mother’s womb; whence it is evident that the person in whose favour the acknowledgment was made was the heir of the acknowledger at the period of his acknowledgment; and consequently, that he has made an acknowledgment *in favour of his own son*, which is invalid of course.—It is otherwise with respect to marriage; for, as the relationship produced by that takes place only from the time of contracting it, it follows that the woman was not the acknowledger’s heir at the time of the acknowledgment; and consequently, that his acknowledgment in her favour remains valid.

but it is annulled by a subsequent acknowledgment of the stranger being his son.

If a sick person repudiate his wife by three divorces, and then make an acknowledgment of debt due to her, and die*, she is in that

Case of acknowledgment in fa-

* Before the expiration of her *edit*.

vour of a re-
pudiated wife.

case entitled to which ever of the two claims (namely, her portion of inheritance, or the amount of the debt acknowledged) may be the smallest.—The reason of this is that both the woman and the man are in this case liable to suspicion; for as the *edit*, or term of probation, was not expired, the woman, after his death, is an heir, and an acknowledgment in favour of an heir is not valid.—Hence there is a possibility that the woman may have requested her divorce as the means of her acquiring a right to the acknowledgment; and that the husband may have divorced her with the view of giving her more than she was entitled to as an heir. As, therefore, both husband and wife are liable to suspicion, the *smallest* of the two claims is decreed to the woman, since concerning that there can be no suspicion*.

SECTION.

MISCELLANEOUS CASES.

Acknow-
ledgments of
parentage with
respect to in-
fants.

If a person acknowledge the parentage of a child who is able to give an account of himself, saying "this is my son," and the ages of the parties be such as to admit of the one being the child of the other, and the parentage of the child be not well known to any person, and the child himself verify the acknowledgment, his parentage is established in the acknowledger, although he [the acknowledger] be *sick*; because the parentage in question is one of those things which affect the *acknowledger himself* only, and no other person.—It is made a condition, in this case, that the ages of the parties be such as to admit of the relation of parentage; for if it were otherwise, it is evident that the

* See this treated of at large under the head of *the divorce of the sick*. (Vol. I. p. 279.)

acknowledger

acknowledger has spoken falsely.—It is also made a condition, that the parentage of the boy be unknown; for if he be known to be the issue of some other than the acknowledger, it necessarily follows that the acknowledgment is null.—It is also made a condition, that the boy verify the acknowledgment; because he is considered as his own master, as he is supposed able to give an account of himself.—It were otherwise if the boy could not explain his condition; for then the acknowledgment would have operated without his verification.—It is to be observed that the acknowledgment, in this instance, is not rendered null by sickness; because parentage is an *original* and not a *supervening* want. By the establishment of the parentage, therefore, the boy becomes one of the acknowledger's heirs, in the same manner as any of his other heirs.

If a person acknowledge his *parents* or his *son*,—(as if he should declare that “a certain man is his father,” or, that “a certain woman is his mother,” or, that “a certain person is his son,”—and the ages of the parties admit of those relations,)—or, if a person acknowledge a particular woman to be his wife, or a particular person to be his *Mawla*, (that is, either his *emancipator*, or his *freedman*,)—in all these cases the acknowledgment is valid, as affecting only himself, and not any other.—In the same manner, also, if a woman acknowledge her parents, or her husband, or her *Mawla*, it is valid, for the same reason.—A woman's acknowledgment of a *son*, however, is not valid, as such acknowledgment affects her husband, in whom the parentage is established: her acknowledgment of a *son*, therefore, is not valid, unless the husband confirm her declaration, (as the right appertains to him,) or, that it be verified by the birth being proven by the evidence of one midwife, which suffices in this particular.—(Concerning the acknowledgments made by women of their children, there are various distinctions, as set forth at large in treating of *claims*.)—It is to be observed that in all these cases the confirmation of the party concerning whom the acknowledgment is made is requisite, excepting

Acknowledgments with respect to parents, children,

and patrons, are valid,

if confirmed by the parties.

in the acknowledgment with respect to a *child*, when so young as not to be able to give any account of himself.—It is also to be observed that the confirmation concerning *parentage* is valid, although made *after the death* of the acknowledger; because the relation of parentage exists after death.—In the same manner, also, the confirmation of a wife, after the death of her husband, is valid; because the *edit* is one of the effects of marriage; and that exists after the death of the husband, whence it may be said that the marriage *itself* endures in one shape; and therefore the confirmation of the wife, after the death of her husband, is valid.—So also (in the opinion of the two disciples) the confirmation of the *husband* is valid, after the death of the wife; because *inheritance*, which is one of the effects of marriage, exists after the death of the wife; whence the *marriage itself* endures, in one shape; for which reason his confirmation is valid.—According to *Haneefa* the confirmation of the husband is not valid, because the marriage expires upon the death of the wife; on which account it is not lawful for a husband to wash the body of his wife after her death.—In regard to the assertion of the two disciples, that “the marriage endures, in one shape, after the death of the wife, because of inheritance,” it is not admitted; for the inheritance does not take place until *after* death, and was therefore a nonentity at the time of the acknowledgment.—Now a confirmation, in order to be valid, must be directed to the period of the acknowledgment; and as, at that period, the inheritance did not exist, it is therefore invalid.

The acknowledgment of a dying person, with respect to an *uncle* or *brother*, entitles them to inherit, (if he have no other heirs,) but does not establish their parentage.

If a person acknowledge an *uncle* or a *brother*, such acknowledgment is not credited, so far as relates to the establishment of the parentage, because of its operating upon another than the acknowledger. If, therefore, the acknowledger have a *known heir*, whether near or remote, the whole of the inheritance goes to him, and not to the person in whose favour the acknowledgment is made, since the parentage not having been established on the part of the acknowledger, no obstacle can thence arise to the inheritance of a known heir.—If, however,

however, the acknowledger have no other heir, the person in whose favour he makes acknowledgment is in that case clearly entitled to the inheritance, as every person has full power over his estate when he had no heirs; whence it is that a person may bequeath the *whole* of his property in legacy, provided he have no heirs. The person in whose favour the acknowledgment is made is therefore in this case entitled to the whole of the property, although the parentage be not proven, (that is, although he be not admitted to be the brother or uncle of the acknowledger;) as that would tend to affect *another*; namely, the father or *grandfather* of the acknowledger*.—It is to be observed that the acknowledgment, in this case, is not in reality a *legacy*; because, if a man should acknowledge a particular person to be his *brother*, and afterwards bequeath the whole of his property to another, the legatee would in that case be entitled only to *one third* of the whole of the property; whereas, if the acknowledgment had been in reality a *legacy*, the person in whose favour the acknowledgment is made, and the legatee, would in that case share the whole of the property equally between them. The acknowledgment, however, is *equivalent* to a legacy, on this consideration, that the person in whose favour it is made is entitled to the property merely because of the *declaration of the acknowledger*, and not from any other cause whatever, as in *bequest*: for which reason, if a sick man should acknowledge a certain person to be his *brother*, and this person confirm the same; and the acknowledger afterwards deny his right of inheritance, and bequeath the whole of his property to some other, the legatee is entitled to the whole of his estate;—or, that, if he should not bequeath his property to another, the whole of his estate goes to the *public treasury*; because retraction is in this case valid, for this reason, that the parentage, which annuls the validity of the acknowledgment, is not established.

* Because, if he were admitted to be actually the *uncle* or the *brother* of the acknowledger, that would induce, in his favour, a claim of inheritance from them also.

The acknowledgment of a brother, by the heir, entitles to inheritance, but does not establish parentage.

If a person die, and his son acknowledge another to be his *brother*, the parentage of the person in whose favour the acknowledgment is made is not established, but he is entitled to a share in the inheritance with the acknowledger;—because the acknowledgment in question involves two consequences; namely, the establishment of the parentage, which, as affecting another, does not take place,—and the participation of the acknowledgee in the property, which, being a power he possesses, as affecting himself only, does therefore take place.—In the same manner as where a purchaser acknowledges that the slave he has bought had been emancipated by the seller, in which case the acknowledgment (so far as it relates to the *seller*) is not to be credited; and on this account the buyer is not entitled to retake the purchase-money from the seller:—the acknowledgment, however, is credited so far as it relates to *himself*, and therefore the slave is free.

Case of acknowledgment, made by a co-heir, of the partial payment of a debt owing to the person from whom the inheritance descends.

If a person, to whom a debt is owing by another of one hundred *dirms*, should die, leaving two sons, and one of these acknowledge that his father had received payment of fifty *dirms* of the said debt, in that case the acknowledger is not entitled to any thing; and the other is entitled to the remaining fifty *dirms*;—because, as the acknowledger has here made an avowal which operates upon himself, his brother, and the deceased, it is therefore valid only so far as it relates to *himself*, and not with respect to any other; for his acknowledgment that the deceased had received fifty *dirms* of the debt, is equivalent to an acknowledgment that the deceased owed fifty *dirms*, since the receiving payment of a debt cannot be established but by the receipt of a thing involving responsibility;—(that is to say, by the receipt of a thing which induces responsibility on the receiver, so as that this responsibility may stand as a debt against him, and that then a mutual liquidation may take place, by the opposition of the debt of one to the debt of the other.)—Upon the other brother, therefore, contradicting the acknowledgment, the debt which it in consequence established upon the deceased, is opposed to the share of the acknowledger, in conformity

conformity with the tenets of our doctors; for with them it is an established tenet that if one of the heirs acknowledge a debt due by the deceased, and the other heirs contradict the same, the debt is in that case charged to the share of the acknowledger.—In short, both brothers agree in this, that the sum to be received by the brother who is not the acknowledger (namely, fifty *dirhms*) appertains equally between them:—it is to be considered, however, that if the acknowledger were to take the half from his brother upon his receiving payment of these fifty, he would then take it from the debtor; and the debtor, again, would take the same from the acknowledger; which revolution would be totally useless: and this is the true meaning of the *Der*, or revolution, as mentioned in the *Hedâya*.

conformity with the tenets of our doctors: for with them it is an established tenet that if one of the heirs acknowledge a debt due by the deceased, and the other heirs contradict the same, the debt is in that case charged to the share of the acknowledger.—In short, both parties agree in this, that the sum to be received by the brother who is not the acknowledger (namely, fifty) appears equally divided between them:—it is to be considered, however, that if the acknowledger were to take the half from his brother upon his receiving payment of these fifty, he would then take it from the debtor; and the debtor, again, would take the same from the acknowledger; which revolution would be totally useless: and this is the true meaning of the

B O O K XXVI.

Of SOOLH, or COMPOSITION.

Definition of
the term.

SOOLH, in the language of the LAW, signifies a contract by means of which contention is prevented or set aside.—The essentials (or *pillars*) of it are declaration and acceptance; and the conditions of it, that the subject of the composition (that is, the thing with relation to which the contract is formed) be *property*; and also, that it be defined, provided there be a necessity for seizure, but not otherwise.—Thus if a person claim some degree of right in a house belonging to another,—and that other claim some degree of right in a shop belonging to this person, and they come to a compromise, by relinquishing their respective rights in favour of each other, such compromise or composition is valid, although they should not have explained

plained the extent of their rights; since ignorance with respect to a claim which is to be annulled is not a cause of contention.

Chap. I. Introductory.

Chap. II. Of *gratuitous* or *voluntary* Compositions; and of the appointment of *Agents* for Compositions.

Chap. III. Of Compositions of Debt.

CHAP. I.

COMPOSITION is of three kinds or descriptions.—I. *Composition with ACKNOWLEDGMENT*; (as where the defendant acknowledges the right of the plaintiff, and then compounds it for some other thing:)
 II. *Composition under SILENCE*; (as where the defendant neither acknowledges nor denies the claim:)—and, III. *Composition after DENIAL*.—All these descriptions of composition are lawful; because God says, in the *Koran*, “COMPOSITION IS LAUDABLE;” and this ordinance being *absolute*, necessarily includes all these species of it;—and also, because the prophet has said “every composition is lawful amongst MUSSULMANS, excepting such as renders lawful what is unlawful, or renders unlawful what is lawful.”—*Shafei* maintains that compositions *after denial* or *under silence* are unlawful, because of the above tradition; for in these two cases it necessarily follows that what is unlawful becomes lawful, and what is lawful becomes unlawful,—since the thing given in composition was, previous to the conclusion of the contract, unlawful to the giver, and lawful to the receiver;

Composition may be made in three modes—with acknowledgment,—under silence,—and after denial.

receiver; but afterwards becomes the reverse. Besides, in both these cases, the defendant gives property for the removal of contention; and this is *bribery*.—The arguments of our doctors, in support of their opinion upon this point, are threefold. **FIRST**, the text of the *Koran*, as above quoted.—**SECONDLY**, the *first* part of the above tradition concerning the prophet, comprehends *both* the cases in question; whereas the *latter* part applies solely to a composition which renders lawful something in itself originally unlawful, such as *wine*;—or, which renders unlawful something that in itself was originally lawful; as where a man agrees with a wife, for a certain consideration, not to have carnal connexion with another of his wives.—**THIRDLY**, composition after *denial*, or under *silence*, is a composition in consequence of a *valid claim*, and is therefore effectual, since the *claimant* receives the thing given in composition in lieu of a right of his own, which in his opinion was a just one; and this is lawful; and the *defendant*, on the other hand, pays it to remove from himself a contention;—and this also is lawful; because the object of property is self-preservation; and the giving of a bribe, with a view to remove oppression from himself, is lawful in the giver. Besides, this cannot be strictly termed a *bribe*, as a bribe is what is taken by the receiver for the reason assigned by the giver, whereas here it is otherwise, for the giver gives it in order to prevent contention, and the receiver takes it because in his opinion it is his just right.

Composition, by a concession of property for property, is equivalent to sale:

and is rendered invalid by an igno-

IN a composition made after acknowledgment, all the effects of *sale* take place, provided it be a composition of *property for property*; because it then corresponds, in its nature, with *sale*, which is an exchange of property for property by mutual consent of the parties;—whence it is that, if it relate to land, it admits of the right of *Shaffa*; and also, that the consideration may be returned on account of a *defect*; and that the conditions of *inspection* and of *option* exist with respect to it.—This species of composition, therefore, is rendered invalid by an ignorance of the *consideration* for the composition, as such ignorance

ignorance may be a cause of contention, whereas an ignorance of the subject of the composition cannot afford any cause of contention, as that merely ceases, (in consequence of the composition,) whence there is no occasion for taking possession of it.—It is, moreover, a condition, that the defendant be competent to make good the amount of the consideration in question.—If, however, the composition be a stipulation of usufruct in lieu of property, then the laws and rules incident to *hire* take place with regard to it; because the characteristic of *hire* (namely, an endowment with usufruct in exchange for property) exists in it;—and as, in contracts, regard is had to the spirit of the agreement, it is also requisite that the period of right to the usufruct be fixed.—The composition is also rendered null by the decease of any of the parties during that term*, because a composition of this nature is a species of *hire*†.

rance of the thing to be given in composition.

Composition by a concession of usufruct is equivalent to *hire*;

but the term of usufruct must be specified.

COMPOSITIONS subsequent to *denial* are, with respect to the defendant, equivalent to an atonement for an oath‡,—and subsequent to *silence*, they stand (with respect to him) merely as a removal of strife;—but they do not stand as a mutual exchange, with respect to him, in either case.—With respect to the plaintiff, on the contrary, they are in the nature of a mutual exchange; because the plaintiff accepts the composition in lieu of an article which in his belief was his right; and one contract may lawfully bear different interpretations with regard to the two parties, in the same manner as the dissolution of a sale is an annulment of the contract with respect to the seller and purchaser, but with respect to others, a new sale. The reason of a

Compositions after denial are equivalent to an exchange with respect to the plaintiff, but not with respect to the defendant.

* That is, during the term of usufruct.

† A contract of *hire* is rendered null by the demise of either of the contracting parties during its term.

‡ Supposing him (as defendant) to have sworn to the fallacy of the plaintiff's claim; in which case, if he afterwards enter into a composition with the plaintiff, it is evident that he swore falsely, and consequently, that atonement or expiation is due for his perjury.

composition after *denial* standing, with respect to the defendant, as an *atonement for an oath* is obvious;—and it stands after *silence* as a mere *removal of strife*, because silence admits of two suppositions, namely, *acknowledgment* or *denial*; and hence, with respect to the composition in question being a *contract of exchange*, there is a *doubt*; and, in consequence of this doubt, it cannot be established as an *exchange* with respect to the *defendant*.

The concession of a house, by a composition, does not induce a right of *Shaffa*:

IF a person claim a house from another, and that other either deny the claim, or remain silent, but afterwards compound the matter with the claimant for a certain amount, in that case the right of *Shaffa* does not operate with respect to that house; because the defendant receives it as his *original right*, and not in virtue of *exchange*; since he gives the amount of the composition to the plaintiff merely to put an end to the contention.

OBJECTION.—Although the defendant, in his own belief, receive the house as his original right, and pay the composition to put an end to the contention, yet the plaintiff believes that he receives the composition *in lieu* of the house, and therefore (on the grounds of the belief of the plaintiff) the right of *Shafa* ought to operate.

but *Shafa* is induced by the act of giving a house in composition.

REPLY.—The belief of the *plaintiff* has no effect upon the *defendant*, since a man is judged by *his own* belief, and not by that of *others*.—It is otherwise where a house is given in composition; (as where, for instance, a person claims some property from another, and that other, after denying the right, or remaining silent, compounds the claim by giving up a *house*;) for in this case the right of *Shafa* takes place, as the plaintiff receives the house in exchange for his property, and the composition is therefore, with respect to *him*, a *contract of exchange*,—(for which reason the right of *Shafa* operates upon *his own acknowledgment*, notwithstanding the defendant contradicted him.)—It is therefore the same as if he were to declare that “he has *purchased* the house from the defendant,”—and the defendant

deny the same; in which case the right of *Sbaffa* operates; and so also in the case in question.

If a person claim something from another, and that other, having acknowledged the claim, compound it with the plaintiff for something else; and it afterwards appear that the thing claimed was in part the property of another,—in that case the defendant is entitled to take back from the plaintiff a part of the thing given in composition, proportionate to that part of the article claimed, which afterwards proved the property of another; because the composition in this case is, like sale, a contract of exchange with respect to both parties; and such is the law in *sale*, when a part of a thing sold proves the property of another.

If a person claim a thing from another, and that other either deny it or remain silent, and then compound with the plaintiff for some other article, and it afterwards appear that the thing claimed is the right of another and not of the plaintiff, in that case the plaintiff must prefer his demand against the person who claims the right, and return to the defendant whatever he may have received from him in composition; because the defendant gave his property merely for the purpose of removing contention; but when, afterwards, it appears that the thing claimed is the property of another, it becomes evident that he was not liable to a contention with the plaintiff. Hence he is entitled to take back the article given in composition, as the condition on which he gave it (namely, a right to detain in his possession the subject of the claim) is rendered void.—If, on the other hand, a *part*, only, of the thing claimed prove the right of another, the plaintiff must in that case return to the defendant a proportionate part of the thing given in composition, and make a demand for the same upon the person possessing the right; because the intent of the defendant does not comprehend that proportion.

Cases in which part of the thing given in composition must be restored.

If the composition be after *denial* or *silence*, and the thing compounded for prove the right of another, the consideration must be returned, and the plaintiff must lay his claim against him who has the right;

and the same, proportionably, where any *part* of it proves the property of another.

If the thing given in composition after acknowledgment, prove the right of another, it must be restored, and the plaintiff is entitled to an equivalent from the defendant.

If this happen in composition after *silence* or *denial*, the plaintiff must claim, from the defendant, the article in dispute.

If the thing given in composition prove the right of another, the plaintiff is in that case entitled to receive from the defendant the whole amount of the composition, provided it be after *acknowledgment*, as this species of composition is equivalent to *sale*, (as was before explained.)—If, also, the right of another appear to a *part* of the composition, the plaintiff is entitled to a proportionate part of it, for the same reason.

If, in a case of composition after *silence* or *denial*, it appear that the whole or a part of the thing given in composition is the property of another, the plaintiff must prefer a claim against the defendant for the thing in dispute between them, either *wholly*, or in *part*, as the case may be.—It is otherwise in a case of *sale* after denial; as where, for instance, a person lays claim to a house, and the person upon whom the claim is made denies his right, but afterwards compounds the matter by means of a slave, using, however, the word “*sold*” instead of “*compounded*,” as if he should say “I have “*sold* this slave for the said house;” for, in that case, if the house afterwards prove to be the property of another, the plaintiff, instead of claiming, is entitled actually to take the house from the defendant; because the defendant, in *selling* the slave for the house, does virtually acknowledge the house to be the property of the plaintiff:—contrary to a case of *composition*, as compositions are frequently made merely to remove contention.—It is to be observed that, in case the thing given in composition be either lost or destroyed in the hands of the defendant, previous to the delivery of it, the law is the same as where it proves the right of another:—that is, if the composition follow *acknowledgment*, the plaintiff is entitled to take the article claimed;—or, if it follow *denial* or *silence*, he must prefer a claim for it against the defendant.

A composition for an undefined part

If a person claim a right in a house, without explaining the extent of it, (such as a *third*, a *fourth*, or the like,) and the defendant, under

under this state of uncertainty, give him something in composition for his claim, and the right of another afterwards appear to a *part* of the house, the plaintiff is not in that case obliged to return to the defendant any part of the thing received in composition, - since it is possible that the right may relate to some *other* part of the house, and not to that part which the plaintiff had claimed. It is different where the *whole* of the house proves to be the property of another; for in that case the whole of the thing given in composition must be returned to the defendant; since it would otherwise necessarily follow that the defendant had received nothing in exchange for the thing he gave in composition; and this is unlawful; as has been already explained under the head of *sale*.

of a thing is not affected by the right of another afterwards appearing to a *part* of that thing.

If a person claim a house, and the defendant compound the claim for a *part* of the house, such composition is unlawful, because what the plaintiff receives is already his actual right, and the rest of his claim remains unsatisfied. There are two devices, however, by which this composition may be rendered lawful.—The one is, by the plaintiff adding a *dirm* to the share of the house; in which case, the *dirm* is considered as an equivalent for the remaining part of the claim:—the second is, by the plaintiff exempting the defendant from the remaining part of the claim.

Composition in consideration of a part of the subject is invalid.

SECTION.

COMPOSITIONS are lawful in claims of *property*; for a composition (as was before explained) being in the nature of a *sale*, it follows that whatever may be lawfully *sold* may also be lawfully *compounded*.—Compositions are likewise lawful in claims of *usufruct*; as for instance, where

Disputes concerning *property* may be compounded;

and also,
claims of usufruct.

where a person prefers a claim, against the heirs of a person deceased, to the usufruct of, or right to dwell in, a particular house, in virtue of the bequest of the deceased; in which case, if the heirs, having either denied or acknowledged the claim, should compound it with the plaintiff for something else, such composition is valid.—The reason of this is that usufruct is considered as a *property*, in a contract of *hire*, and so also in a case of *composition*;—for it is a general rule, to consider the composition as partaking of the nature of that contract to which it bears the nearest resemblance, in order to render it valid.—Thus, if the composition be of *property for property*, it is considered as a *sale*, because of its near resemblance to that contract.—If, on the other hand, it relate to *usufruct*, it is considered as a species of *hire*, because of its resemblance to it.

Compositions
are lawful in
homicide.

COMPOSITIONS are lawful in cases either of *wilful* or *erroneous* bloodshed.—They are lawful in the *former* instance, because God has said “IF A PORTION OF THE PROPERTY OF THE MURDERER, BEING
“A BELIEVER, BE OFFERED, BY WAY OF COMPOSITION, TO THE
“REPRESENTATIVE OF THE MURDERER, LET HIM ACCEPT THE
“SAME;”—which passage *Ibn Abbas* reports to have been revealed upon the subject of compositions for wilful bloodshed.—It is to be observed that composition for *wilful bloodshed* resembles *marriage*, because in both cases property is given without receiving property in return; and accordingly, whatever is capable of constituting a specific dower, is also capable of being given in composition for wilful bloodshed.—There is this difference, however, between marriage and the composition in question, that whenever the recital of the thing to be given in composition is invalid, (as where an *animal* is mentioned indefinitely, or cloths are recited without a specification of them,) a *Deyit* or fine of blood must be paid;—because such is the rule in cases of bloodshed; and an invalidity in the nomination does not prevent the remission of retaliation, in the same manner as it does not prevent the validity of marriage.—If, however, a composition of *wine* or *pork* be stipulated for wilful bloodshed, nothing whatever is due; because
neither

but if acceded
to for an
unlawful article, nothing
is due.

neither of these articles are valuable property: it is therefore understood that the avenger of blood, in agreeing to receive a composition which is not property, has, in effect, remitted the retaliation; and as, in a remission of the retaliation, no property is due, so neither is it in the case in question.—In marriage, on the contrary, a *Mahr-Misl* (or *proper* dower) is due in either case, (that is, in case of the invalidity of the recital,—or, where the dower is stipulated to be paid in wine or pork;) because the dower is one of the essential requisites of marriage, and is therefore due in LAW, although no recital should have been made of it. It is to be observed that as the crime expressed in this case of composition is *absolute*, it relates both to the *members* of the body, and to the *body itself*, that is to say, the *life*.—It is also proper to observe that, although compositions for wilful bloodshed be lawful, as above related, yet it is otherwise with respect to compositions of property for the right of *Shafa*, (by a person receiving property from a purchaser, in composition for his right of *Shafa*,) which is invalid, because the proprietor of the right of *Shafa* has no absolute property from it, but merely a right to become proprietor if he please: until, therefore, he become the proprietor, he has no right to compound for it.—*Retaliation*, on the other hand, means a right of property in the subject, with respect to the *action*: in other words, the heir or representative is proprietor of the subject so far as relates to the action, in as much as he has a right to take retaliation, and may consequently, if he choose, receive a composition for not taking of it: in opposition to the case of *Shafa*.—Now, since a composition of property for the right of *Shafa* is invalid, it follows that nothing is on that account due from the purchaser, and that the right of *Shafa* is lost, in the same manner as in a case of *non-opposition* or *silence*.—Bail for the person is also like the right of *Shafa*, and therefore nothing is due in case of a composition of property for it.—With respect, however, to the annulment of the bail, in such a case, there are two traditions, both of which have been already recited in their proper places.—Compositions are also lawful in the *latter* case (namely, *er-*
roneous

aneous bloodshed,) because they in this instance relate to *property*, and therefore resemble *sales*. Still, however, they are not lawful when they exceed the amount of the fine of blood; because the rate of that, as having been fixed by the *LAW*, cannot be set aside: any thing, therefore, beyond the fine of blood, must be rejected.—It is otherwise in *retaliation*, for there the composition may exceed the *fine of blood*, as retaliation is not *property*, and therefore cannot be converted into it but by a special contract.—What is here advanced proceeds upon the supposition that the composition consists of one of the three species of *Deyits*, namely *dirms*, *deenars*, or *camels*.—If, however, it consist of any other species of property, it is lawful, because it is in that case an exchange for the *Deyit*, or *ordained fine*. But yet it is requisite that the delivery be made upon the spot where the contract is concluded, because it must otherwise follow that one debt (namely, the *Deyit*) remains opposed to another debt (namely, the *composition*,) which is declared, in the sacred writings, to be illegal.—If the *Kázee* should pass a decree directing the murderer to pay the *Deyit* in one of the three modes to the avenger of blood; and he [the murderer] enter into a composition with him [the avenger] for another species of property, in a degree exceeding the *Deyit*, such composition is lawful, provided it be from hand to hand; because, after the decree of the *Kázee*, the right of the avenger of blood to the amount decreed by the *Kázee* becomes fixed and determined; and his composition of it, in that case, is merely an *exchange*.—It is different where the parties themselves, in the *beginning*, enter into a composition for one of the three kinds, exceeding the amount of the *Deyit*; because the consent of the parties to one of the three kinds is equivalent to the decree of the *Kázee* in respect of fixing it;—(that is, in the same manner as it is fixed by the decree of the *Kázee*, so also is it fixed by their consent;) and as the *Kázee* is not empowered to pass a decree exceeding the amount of the *Deyit*, so neither are they permitted to fix it at a superior rate. Hence it is not lawful to exceed the rate of a thing already fixed by the sacred writings.

COMPOSITION for claim of *Hidd*, or stated punishment, is not lawful.—Thus if a person should apprehend another in the act of whoredom, or of stealing the goods of another, or of drinking wine, or whilst in a state of intoxication, and, intending to carry the culprit before the *Kázee*, should notwithstanding accept something for suffering him to escape, such composition is invalid; because *punishment* is a right of God, and it is not lawful to accept a composition for the right of *another*.—For the same reason, also, it is not lawful to compound with a woman for a claim of parentage. For instance, a divorced woman, having brought forth a child, says to the divorcer “this is your child,” and he denies the same, but compounds with the woman for withdrawing her claim; which composition is invalid, because the claim of parentage was not *her* right, but that of the *child*; and the acceptance of a consideration for the right of another is not valid.—In the same manner, if a person erect a bathing-house, or a place for sitting in, on the high road, and another having required him to pull it down, he compound with him to withdraw his claim, such composition is invalid, because, the high road being the right of the community, no individual is singly entitled to compound for it.—It is to be observed that the *punishment* mentioned on this occasion comprehends *punishment for slander*, because in such punishment the right of God is predominant.

There is no composition for *punishment*,

claim of parentage,

or, for sufferance of a building on the highway.

IF a person claim marriage with a woman, and she deny the same, but compound with the man for his claim, the composition in that case is valid, because there is a possibility of reconciling it to the LAW, by supposing that the man conceives the contract of composition to be in the nature of a *Khoola*; and, on the other hand, that the woman pays the money to remove strife.—Lawyers, however, have asserted that, in the sight of God, it is not lawful for the person, in this case, to take the composition, if his claim be unfounded.

A claim of marriage may be compounded,—whether the claim proceed from a man,

or a woman.

If a woman claim marriage with a man, it is lawful for him to compound the claim with her. The author of the *Hedaya* remarks, upon this, that although the law be thus stated in several copies of the compendium*, yet in other copies such composition is declared to be illegal.—The *legality* of it is established by supposing that the thing given in composition is an increase of her dower; and that he afterwards *sells* her a divorce for the amount of her original dower†, so that the increase, or the amount of the composition, remains binding upon him.—The reason of its *illegality* is, that the man having given something by way of composition to the woman, to induce her to retract her claim, it follows that this retraction must either be considered as equivalent to a separation between them, or as *not* equivalent to a separation: now, if it be equivalent to a separation, it is invalid, because no property is given for a *separation*, since it operates of itself upon the parties; (as, for instance, where a woman admits the son of her husband to carnal connexion, in which case the LAW enjoins a separation between them:)—if, however, on the other hand, the retraction from the claim be *not* considered as equivalent to a separation, then the case remains as before; and the composition is consequently invalid, as not being opposed to any advantage in exchange.

A claim of
bondage may
be com-
pounded;

If a person claim another as his slave, and that other compound with him for his claim, by giving him some specific property, such composition is valid, as being, with respect to the plaintiff, an *emancipation in exchange for property*; because in his belief the defendant gives the composition in exchange for his freedom; and is therefore considered in the light of a *Mokâtib*.—It is for this reason, also, that the composition in question is valid, if made in consideration of an animal due, and to be delivered at a fixed future period; because

* The *Mookhtaffir*; a compendium of the commentary of *Kadooree*. † See *Khoola*.

it would not be valid if it were considered as an *exchange* of property for property instead of an *emancipation* for property: for an animal cannot exist as a debt in exchange for property, as has been explained in treating of the *Sillim* sale of animals: but it may exist as a debt for something else than property, as in the case of *marriage* or a *fine of blood*.—It is therefore requisite that the composition in question be considered as an *emancipation*, and not as an *exchange*.—With respect to the *defendant*, the composition, in this case, is merely a *removal of contention*, since he believes himself to be originally free.—It is to be observed that in this case no right of *Willa* over the defendant rests with the plaintiff, because of the denial of the former.—If, however, the plaintiff prove by witnesses that the defendant was his slave, such evidence is admitted, and the right of *Willa* then rests with him.

but it leaves
no right of
Willa in the
claimant.

If a *Mazoon*, or *privileged* slave, wilfully kill a person, he is not of himself entitled to compound for the murder: but if *his* slave should commit murder, he may then lawfully compound for it. The distinction between these two cases is that the person of a *privileged* slave not being a subject of *traffic*, he is not entitled to dispose of it in any manner, (such as, for instance, to *sell* himself,) and in the same manner he is not entitled to *redeem* his person by means of the property of his master, being considered with respect to his person as a stranger. *His* slave, on the contrary, is a subject of *traffic*, whence he is at liberty to sell, or otherwise to dispose of him, and consequently may also redeem him. The reason of this is that the slave, on committing the crime, ceases to be his property; whence the composition resembles a *purchase* of him; and this it is lawful for a *privileged* slave to make.

A *privileged*
slave cannot
compound for
offences com-
mitted by
himself; but
he may for
offences com-
mitted by his
slave.

If a person usurp cloth from a *Jew*, of which the value was less than a hundred *dirms*, and, having lost or destroyed the same, compound the matter with the *Jew* by agreeing to pay him a hundred

Case of com-
position for a
property
usurped; and
which pe-

ribes in the
usurper's
hands.

dirms previous to any judicial decree upon the subject, in that case the composition is lawful, according to *Haneefa*. The two disciples maintain that the composition, in this case, is not lawful in the degree in which it exceeds the appraised value of the cloth; because nothing was due from the usurper but the *value*; and the value of any article is to be known only by appraisement; any thing beyond *that* must therefore be considered as usury.—It is otherwise, however, if the composition for the cloth be made in articles of *furniture*, or so forth, exceeding in value the article usurped; for such composition is valid, because the difference of the value not being *obvious*, from the articles being of a different genus, no usury can be inferred. It is otherwise, also, if the difference of value be such as may come within the estimation of *some* of the appraisers, because the observance of an *excessive degree* of caution is impracticable. The reasoning of *Haneefa*, in support of his opinion, is that the right of the proprietor of an usurped article continues in it after its destruction, until his right to an equivalent be established; as is evident from this circumstance, that if an usurped slave should die, and the master refuse to accept an equivalent, he must in that case defray the expences of his burial. Now from this it appears either that the right of the proprietor of an usurped article remains in it after its destruction,—or, that he has a right, if he chuse, to a similar, both in *appearance* and in *reality**, because reparation for a transgression must be made in a *similar*.—But his right is not transferred to the *value* until such time as the *Kázee* pass a decree to that effect: any agreement, therefore, exceeding the value, which the parties themselves may conclude previous to such decree, being merely a *compensation* for the article destroyed, or for one similar to it in *appearance* and *reality*, cannot be considered as usurious.—It is otherwise if such agreement be made *after* the decree of the *Kázee*; for, in that case, according to all our doctors, the composition is not valid, as far as it exceeds the value; because, in this

* Independent of any judicial decree.

instance,

instance, the right of the proprietor to the value has become fixed and determined by the decree of the *Kázee*; and any thing beyond it is therefore usurious.

IF a man who is *rich* emancipate a slave held equally in partnership between himself and another, and compound with that other for a sum exceeding the value of his half, such composition is invalid, according to all our doctors:—according to the two disciples, because (as they hold) nothing is due from the emancipator beyond *half the value*, which is to be ascertained by appraisement; whence any degree beyond that is usurious:—and, according to *Haneefa*, because the *value*, in emancipation, is decreed by the LAW; now the rate fixed by the LAW is not short of the rate fixed by the *Kázee*; and as, in a case where the *Kázee* passes a decree for the value, a composition for any thing *beyond* the value is null, it is in the present instance null *a fortiori*.—It is otherwise in the example concerning the cloth, as before recited, because the *value* of that is not decreed by the LAW.—It is to be observed that if, in the case in question, a composition exceeding the value of half the slave be made in *specific* goods or effects, it is valid, because the excess in the value is not *obvious*, where the articles are of a different genus; and hence no usury can be inferred.

Case of composition for a share in a partnership slave.

CHAP. II.

Of *gratuitous* or *voluntary* Compositions; and of the Appointment of *Agents* for Composition.

An agent for composition in a case of *bloodshed* or *debt* is not responsible for the consideration, unless he expressly agree to be so:

but he is responsible where the composition is of *property* for *property*.

If a person appoint another his agent for composition, and the agent accordingly enter into a composition on his behalf, he [the agent] is not responsible for the thing to be given in composition, unless, in settling the contract, he stipulate it as a condition that "he himself" shall be answerable for it."—This is where the composition is on account of *wilful bloodshed*, or of some claim in the nature of debt, in either of which cases the composition is a mere *annulment*; and as the agent, in either case, is merely a *messenger*, he is therefore subject to no responsibility, any more than an agent for marriage;—unless he himself engage in the responsibility,—in which case he becomes answerable, because of his *contract of security*, but not from his *contract of composition*.—Where, however, the composition is of *property* for *property*, it is equivalent to a *sale*, and the rights of it appertain to the agent.—In such a case, therefore, the claim for the property (that is, for the article to be given in composition) lies against the *agent*, not against the *constituent*.

Fazoolie compositions are of four descriptions:

FAZOOLEE compositions (that is, such as are concluded by a *stranger*, in behalf of the defendant, without his desire) are of four kinds.

I. Of a debt by property; (for which

I. Where a person compounds for a claim of debt by property, and makes himself responsible for the property:—in which case the composition

composition is complete, because the defendant acquires nothing from it, but is merely exempted from a debt, and in this respect a stranger and the party that is the defendant are considered as the same.—It is also proper to remark further, that in the same manner as the condition of responsibility for the thing to be given in composition is lawful to the *defendant*, so also is it lawful to the *stranger*: a stranger, therefore, is capable of standing as the *principal* in composition, and in the obligation of the property, when he makes himself responsible for the thing to be given in composition; in the same manner as a *Fazoollee* who concludes a *Kboola* in behalf of a wife.—In other words, if a person propose a *Kboola* to his wife, and another, without the desire of the wife, conclude the *contract* of *Kboola* with the husband on her behalf, making himself responsible for the consideration of *Kboola*, it is valid, and he is responsible for the consideration;—and so also in the case in question, the *Fazoollee* is responsible for the thing to be given in composition.—He, moreover, stands, with respect to the defendant, as one who acts *gratuitously*, in the same manner as a person who voluntarily pays the debts of another, in as much as he exempts the defendant from responsibility; he therefore is not entitled to any return from the defendant: but it is otherwise where the compounder acts by the desire of the defendant, for in that case he is not a *voluntary agent*. The compounder in question, moreover, is not entitled to any part of the debt; but that is cancelled with respect to the defendant; for the principle, with respect to the legality of the composition, in this case, is that the plaintiff annuls the operation of the debt upon the defendant, and not that he renders the compounder proprietor of it,—and this, whether the defendant acknowledge the debt, or deny it;—in a case of *denial*, evidently, because the defendant does not in his own opinion owe any thing, and the opinion or belief of the plaintiff cannot operate upon him;—and in a case of *acknowledgment*, also, because the property of, or right to the debt, cannot be conveyed to another but by the person who is immediately indebted: it is therefore impossible, in this instance, to render the composition valid

the compounder is responsible:)

valid on any other principle than that of the annulment of the debt.—It is otherwise where the plaintiff claims some specific article in the possession of the defendant, who acknowledges the same, and another person, unauthorised, gives him something as a composition for his claim,—because in this case the unauthorised person, in compounding for his claim with the plaintiff, does virtually *purchase* the article claimed; and his purchase of a thing from the proprietor is lawful, although it be not in his possession.

II. Of any thing for a *specific* property; (which must be immediately delivered by the compounder.)

II. Where the compounder says “ I have compounded for *these* “ thousand *dirms* of *my own*,” or “ for *this* slave of *my own*;” in which case the composition is valid; and it is incumbent on the compounder to deliver over the article stipulated to the plaintiff; because, in referring the composition to *his own* property, he renders obligatory upon himself the delivery of it; on which account the composition so made is valid.

III. Of any thing for *un-specified* property: (but which the compounder delivers.)

III. Where the compounder says “ I have compounded for a thousand *dirms*,” and immediately delivers a thousand *dirms* to the plaintiff, in which case the composition is valid; for on the delivery of the thousand *dirms* the plaintiff obtains his object, and the contract of composition is thereby completely fulfilled.

IV. Of any thing for *un-specified* property: (and which the compounder does *not* deliver.)

IV. Where the compounder says “ I have compounded for a thousand *dirms*,” but does not deliver them; in which case the composition remains suspended on the consent of the defendant. If he confirm it, he becomes responsible for the sum stipulated;—or, if he withhold his assent, the composition is annulled.—The reason of this is that in compositions of this nature, the defendant is a principal, because of their operating to free him from contention; but the compounder is also a principal, because of his charging himself with the consideration of composition, either *expressly*, (as where he says “ I am responsible “ for the thousand *dirms*;”) or *directly*, (as where he compounds for one

one thousand *dirms*, and delivers them.)—Now, if he should not so have charged himself, (as the present example supposes,) the contract of composition continues on the part of the *defendant* only*; and the validity of it consequently rests upon his concurrence.—The compiler of the *Hedaya* remarks that a *fifth* kind of composition may be added to the preceding: as, for instance, where a *Fazooler* says “I have compounded for this thousand *dirms*,” or “for this slave,” without referring these to his own property;—which sort of composition is valid, because, in specifying the thing to be delivered to the plaintiff, the compounder does, as it were, establish it as a condition that the said thing shall become the right of the plaintiff.—If, however, the slave should afterwards prove to be the property of another,—or, if it should become known that he was free, or a *Mokâtib* or *Modabbir*,—or, if the plaintiff should return him, on account of a defect, to the compounder, in none of these cases is the plaintiff entitled to take any thing from the compounder, since he engaged for nothing further than the delivery of a *specific article*; if, therefore, that article remain safe for the plaintiff, the contract is valid; if otherwise, he is not entitled to take any thing from the compounder, but must prefer his claim against the defendant.—It is otherwise where the compounder stipulates *dirms*, and makes himself responsible for the same, and they afterwards prove the right of another, or of bad quality, and the plaintiff returns them; for in that case the plaintiff is entitled to take an equal number of good *dirms* from the compounder, because of his having made himself a principal with respect to *security*: and, accordingly, if the compounder refuse to comply, he must be compelled to make the delivery.

Case of a *Fazooler* compounding for a specific article, without referring the same to his property.

* That is to say, he alone is concerned in it.

C H A P. III.

Of Compositions of Debt.

A debt owing
in conse-
quence of any
contract con-
cluded upon
credit may be
compound-
ed by pay-
ment of a
part:

If the thing to be given in composition be of the same nature with the debt which is to be compounded for, and which is owing to the plaintiff under an *Akid Moodāinat*, or *contract concluded upon credit**, the composition is not in that case construed to be an *exchange*, but the plaintiff is considered as taking a part of his right, and annulling or relinquishing the remainder.—An *Akid Moodāinat*, or *contract concluded upon credit*, is where a person purchases the goods of another, for a thousand good *dirms*, (for instance,) and then the parties separate, without the seller receiving the price, or a time of payment being agreed upon:—in which case, if the purchaser should compound the said *thousand* for *five hundred* good *dirms*, (or for five hundred bad *dirms*), and the seller agree to the same, such composition is valid; and it is thus construed, that he [the seller] agrees to accept a *part* of his right, and to relinquish the remainder;—*not* that he accepts the *five hundred* in exchange for the *thousand*.—The reason of this is, that it is necessary, as far as possible, to give validity to the acts of rational persons; and this may be done in the former instance, by the claimant relinquishing a part of the *dirms* to which he is entitled,—or, in the

* The commentators define *Moodāinat* to signify “the act of selling to a person upon credit;”—or “the act of granting credit.”—The composers of the *Persian* version of the *Hedāya* have evidently mistaken the sense of the text in the beginning of this passage. The *Arabic* simply states it “in all compositions for a thing claimed under a *contract upon credit*, “the transaction is not considered as an *exchange*, but as an acceptance of a *part* of the “right, and a relinquishment of the remainder.”

latter instance, by conceding that and the *goodness* of them.—Such also is the rule where the debt has been incurred, on the part of the defendant, by a *usurpation* or *destruction* of property.—The *restriction* to debts owing “in consequence of a *contract concluded upon credit*, (as here set forth,) is for this reason, that it is originally requisite that debt be incurred in consequence of a contract agreeable to LAW.—If, in the case in question, the composition consist of a thousand *dirms* payable at a *distant* time, for a thousand *dirms* *immediately* payable, it is valid; because the construction then given to it is that the plaintiff agreed to postpone his claim,—*not* that he entered into an *exchange*; as the sale of *dirms*, for *dirms* payable at a future period, is not lawful.—If, on the other hand, the thousand *dirms* be compounded for a proportionable number of *deenars*, payable after the expiration of a *month*, (for instance,) it is unlawful; because it is impossible to consider it merely as a *delay* of the claim; since the claim related to *dirms*, *not* to *deenars*; nor is it possible to construe it into a *sale*, because a sale of *dirms*, for *deenars* payable at a future period, is unlawful. The composition, therefore, in this case, is invalid.

If a person have a debt of one thousand *dirms*, payable at a future period, owing to him by another in consequence of a contract upon credit, and compound the same for five hundred *dirms* payable *immediately*, such composition is invalid; because ready money is better than future payment; and ready money not being his right, the composition therefore takes place in a thing which is not his right, whence it is impossible to consider the composition as a dereliction of part of the claim:—it must therefore be necessarily considered as an *exchange*; (in this way, that the debtor gives up his right (namely, the delay of payment) in return for the five hundred remitted:)—those five hundred, therefore, are *in exchange* for the forbearance; and the acceptance of any thing in consideration of *forbearance* is not lawful.

and the same of similar compositions of debt, owing in consequence of any act which subjects to responsibility.

Debt may be compounded by a *forbearance*, for the same sum.

but not if the postponed payment be stipulated in money of a different denomination.

A postponed debt cannot be compounded by the immediate payment of a *pari*.

A debt of *bad* money cannot be compounded by the payment of a smaller sum in *good* money;

but a debt of *good* money may be compounded by *bad*, whether the sum be smaller than, or equal to, the demand.

A debt in money of two denominations may be compounded by a smaller sum of either denomination.

Case of proposal from a

If a person have a debt owing to him by another, in consequence of a contract upon credit, of a thousand adulterated *dirms*, and compound it for five hundred pure *dirms*, it is not valid; because pure *dirms* are not the right of the seller, as those exceed his right with respect to their *quality*, and it accordingly cannot be considered as a *concession*: it must therefore be construed into an exchange of *one thousand* for *five hundred*, superior with respect to quality,—and that is usurious, as *quality* is not regarded in transactions of *exchange*.—It is otherwise where a person compounds a debt of a thousand good *dirms* for five hundred bad *dirms*, because that is a *concession* with respect both to *number* and *quality*. It is otherwise, also, where a person compounds a debt due to him of a thousand bad *dirms* for a thousand good ones; because this is an exchange of *like* for *like*; and in that no regard is paid to *quality*.—It is, however, a condition, in this case, that the plaintiff take possession of the thing given in composition upon the spot, as this is a *Sirf* sale.

If a person have a debt of a thousand *dirms* and a hundred *deenars* owing to him by another, in consequence of a contract upon credit, and compound the same for a hundred *dirms*, ready money, or payable at the expiration of a *month*, (for instance,) such composition is lawful, as it is possible, in this instance, to give validity to the contract of composition, by supposing that the creditor remits the whole of the debt owing to him except one hundred *dirms*, payable immediately, or (as in the *second* case) within a *month*. It therefore is not to be regarded in the light of an *exchange*: for if it were so considered, the contract would not be valid, as it would be usurious. In *compositions*, moreover, a *concession* is always understood; and as, in the case in question, *concession* is the prevalent idea, the matter must be regarded as a *concession* rather than as an *exchange*.

If a person, having a debt due to him, of a thousand *dirms*, payable

able at a future period, should say to the debtor "pay me five hundred *dirms* to-morrow, upon this [condition,] that you are exempted from the remainder of the debt;" and the debtor act accordingly, he is then exempted from the remainder. If, however, in such case, the debtor should not pay the five hundred *dirms* on the morrow, he remains responsible, according to *Haneefa* and *Mohammed*, for the thousand *dirms*. *Aboo Yoosaf* maintains that five hundred *dirms* are immediately remitted, and that the claim to them cannot afterwards be revived: for (in his opinion) the exemption here is absolute*; because the plaintiff has established the payment of five hundred *dirms* as an exchange for the exemption of five hundred *dirms*: but the payment of these five hundred *dirms* cannot be considered as an exchange for the remainder, the payment of which still continues incumbent upon the debtor, and is not at all suspended upon the exemption. To make it an *exchange*, therefore, is nugatory;—consequently there remains only the absolute exemption; and hence the whole of the original debt cannot revive from a failure of the payment on the morrow, any more than if the creditor had said "I have exempted you from five hundred *dirms* out of one thousand *dirms* upon this [condition] that you pay me, to-morrow, five hundred *dirms*;" in which case the exemption is absolute, and so also in the case in question.—The reasoning of *Haneefa* and *Mohammed* is that the exemption, in this case, is not *absolute*, but *conditional*. Upon failure of the condition, therefore, the exemption does not take place, for two reasons. FIRST, because the creditor begins his speech with requiring the payment *to-morrow*, and this may be considered in itself as an object, since it is possible that the creditor is afraid of losing the whole of the money in the event of the debtor's becoming poor, which induces him to use expedition; and also, because he perhaps

creditor to grant his debtor a complete discharge, on condition of his paying one half of the debt within a limited time;

* That is, it is not suspended upon the condition of payment on the morrow.

wishes to get the money, in order that he may acquire profit from it in trade. The expression, moreover, bears the construction of being *conditional*, and is therefore to be taken in that sense, in order to give validity to the contract.—SECONDLY, such conditions are common in compositions; and an exemption may be *restricted* to a condition, although it be not *suspended* upon it. Thus a *transfer of debt* (for instance) is restricted to the condition of *safety*; in so much that if the person who had agreed to accept the transfer* should die insolvent, the debt reverts upon the person transferring it; the transfer, therefore, is *restricted*, in this instance, [to the condition of safety;] and so also in the case in question. With respect to the reasoning of *Abou Roosaf*, an answer will soon be given to it.—The compiler of the *Hedaya* remarks that this case admits of three separate statements.—

which admits of three different statements.

I. Where the proposal has no condition annexed, in failure of payment:

II. Where it is annexed that, in failure of payment the proposal shall be void.

III. Where the discharge is primarily stated.

I. That which has been already explained.—II. Where the creditor says “I have compounded with you the thousand *dirms* for five hundred *dirms*; which you must pay me to-morrow, and then you shall be exempted from the remainder; provided, however, that if you do not pay them to-morrow, the thousand *dirms* shall remain due by you as before;”—in which case, according to all our doctors, if the payment be made on the next day, the exemption holds good; but if otherwise, it is void.—III. Where the creditor says “I have exempted you from the payment of five hundred *dirms* out of a thousand, on this [condition] that you give me five hundred *dirms* to-morrow:”—in which case the debtor is exempted from the payment of the five hundred *dirms*; and this, whether he pay the five hundred on the ensuing day or not, because the exemption is here primarily stated †.

* That is, to take upon him the responsibility for the debt, (in the manner of an acceptor or indorser of a bill of exchange.)

† Two other statements, together with a long discussion, are omitted by the translator, as the whole turns upon certain points of verbal criticism, not capable of an intelligible translation.

If a person say to another "I will not acknowledge your right of property until you first fix a distant time for the delivery, and promise me an indulgence in the payment,"—or "until you first remit to me the *whole* (or a part) of the property,"—and the person so addressed act accordingly, his thus fixing a time, or remitting a part or the whole of the property, is lawful, because he does this of his own accord, and not by *compulsion*.—This is where the acknowledger addresses the other party, as above, *secretly* and in a *covert* manner.—Where, however, he addresses him *publicly*, he becomes liable for the whole of the subject of acknowledgment upon the instant.

An acknowledgment may be stipulated for a composition:

but if the stipulation be publicly proposed, the composition is of no effect.

SECTION.

OF PARTICIPATED DEBTS.

If there be a debt owing to two men, jointly, from a *third*, and one of the two compound with the debtor his share of the debt for a piece of cloth, the fellow-creditor has it in his choice either to demand the other half of the debt, which is his due, from the debtor, or to take the half of the cloth from the compounder; unless, however, he [the compounder] pay him a quarter of the whole debt; for, in that case, he is not entitled to take the half of the cloth.—In short, in all cases of the nature here exemplified, it is a rule that whenever, in a partnership debt, one of the partners receives a part of it, the other partner is entitled to an equal share in the part so seized; because although debt become a sort of *increase* from seizure, (since debt is not considered as substantial property until it be taken possession of,) still this increase has reference to the original right; and as the original right was equally divided, so also is the increase; in the same manner

One of two partners compounding his share of a debt due to them jointly, the other partner may either take his proportion of the composition, or look to the debtor for his share.

manner as *offspring* or *fruit*. The partner, therefore, has a right of participation in the part which is taken possession of.—Still, however, previous to the operation of such right, the part or thing taken is the sole property of the *receiver*, because *substance* is totally different from *debt*, and the receiver has taken the article in question *in exchange for his right*.—He is consequently the proprietor: and accordingly all acts of his with regard to the substance in question are valid, and he remains responsible, in a proportionate degree, to his partner.—It is to be observed that by a *partnership* debt is meant such a debt as becomes due to two or more persons from one cause; such as the price of goods sold by *two* proprietors under *one contract*; or a *debt* inherited by two men; or the value of a joint property destroyed by any person. Now such being the established rule, it follows that, in the case in question, the partner is at liberty either to demand his half of the debt from the debtor, (since his share still remains due to him, in as much as the other partner has only received the amount of his own right,) or to take the half of the cloth from the other partner, because of his right of participation in it.—If, however, the other should give him a compensation, by paying him the quarter of the debt, he then has no right to half of the cloth, as his *right* is only to a *quarter* of the whole debt.

One of two partners receiving payment of his share in a debt due to them jointly, and paying the other his proportion of what is so recovered, has still a claim upon the remainder. If the other prefer receiving pay-

If one of two partners in a debt should receive, from the debtor, the half of his portion of the debt, the other partner is then at liberty either to participate in the half so received, or to look to the debtor for his full share, for the reasons recited in the preceding example.—If, therefore, he should participate with the compounding partner, both partners are in that case entitled jointly to take from the debtor what remains due, because having shared equally in what was received, they are of consequence entitled to share equally in the remainder.—If, on the contrary, he should prefer demanding his share in full from the debtor, to an equal participation in the part received by the other creditor, and that part of the debt which has been received should remain

remain safe, and that which remains due be lost, or destroyed, either by the debtor's dying insolvent, or by his denial of the debt upon oath, he is in that case still entitled to a participation with the other creditor in what has been received; because he declined it before only on the supposition of the *safety* of the remaining part of the debt; and when the event proves otherwise, he of course becomes entitled to an equal participation. Supposing, however, that one of the joint creditors, instead of receiving his share of the debt, should commute it for a debt which he had previously contracted to the debtor,—then the other sharer, in case of the destruction of that portion of debt due to himself, is not entitled to any participation with him, since he is in this instance held to have *paid* a debt, not to have *received* payment of one.—The law is also the same, where one of the creditors *exempts* the debtor from that share of the debt which is due to him, because an exemption is a *destruction* and *annulment*, and not a *receipt*.

IF one of two partners in a debt release the debtor from a *part* of his proportion of the debt, (such as an *half*, for instance,) the remaining part of the debt is, in that case, due to the two creditors in degrees proportionate to their respective rights.—As, for instance, if the debt due to them were originally twenty *dirms*, and one of them afterwards release the debtor from the *half* of his share, the remaining debt will then be fifteen *dirms*, of which *five* are due to the *exempting* partner, and *ten* to the *other* partner.

IF one of two partners should protract the period of payment of his share, it is valid, according to *Aboo Yoosaf*, because of its analogy to an absolute *exemption* or *release*:—in other words, as a suspension of the payment is equivalent to a *restricted* release, it is therefore valid, in the same manner as an *absolute* release.—According to *Haneefa* and *Mohammed* this is not valid; as in such a case it must follow that a division of debt takes place prior to seizure,—since protracting the period of payment with respect to *one* share, and not to the *other*, is, as it were,

ment of his part, solely, from the debtor, and the property be lost, or the debtor prove insolvent, he has then a claim to his proportion of what has been received by this partner; but not where this partner has compounded for his share by a *commutation*.

In a release from a part of his share, by one partner, the right of the creditors continues in proportion to their remaining claims.

One of two partners may agree to a postponement of payment.

a *partition* of the shares; and a *partition* of debt previous to seizure is not lawful; because partition bears the sense of *endowment with a right of property*, and the endowment with a right in a debt, made to any other than the *debtor himself*, is not lawful.—Moreover, partition implies distinction; and as distinction cannot exist with respect to any obligation upon the person, it is therefore invalid.

One of two partners receives his share by usurping any thing from the debtor; or, by losing or destroying any thing belonging to him; or, by accepting a lease in composition; or, by burning a piece of cloth, his property.

If one of two partners usurp some specific article from the debtor, or purchase something from him by an invalid contract, and lose or destroy the same, these acts are considered as equivalent to a receipt of his debt.—So also, if one of two partners accept a *lease* from the debtor in lieu of his debt, he is in that case held to have received his debt. If, also, one out of two partners should *burn* a piece of cloth belonging to the debtor of equal value with his share of the debt, this is a receipt, according to *Mohammed*, but not according to *Abou Yoosaf*. (Some, however, observe that this difference proceeds on the supposition of his having *thrown fire* on the cloth, without having previously *laid hold* of it; for if he should have first laid hold of the cloth, and then burned it, all our doctors are of opinion that he has received his share, because he is considered first to have *usurped* the cloth, and then to have *destroyed* it.)

One of two partners annuls his share by marrying the debtor (being a female) and settling his share of the debt as her dower; or, by compounding with it for an offence.

If the debtor be a female, and one of two partners in the debt should marry her, and stipulate his share of the debt as her dower, this, according to the *Zábir Rawáyet*, is an annulment:—and so also, if he compound, with his share, for a wilful offence.—It is, however, to be observed, that if one of the partners in a debt should marry the woman who is their debtor, without stipulating his share of the debt as her dower, in that case the other sharer has a claim upon him, as under such circumstances he is held to have made a commutation with his wife of *his* claim for *hers*. It is otherwise where he stipulates his share of the debt as her dower; for then he is held to have *annulled*, and not to have *commuted* his right, and on this account the

the other sharer can have no future claim upon him.—It is an invariable rule that, where a receipt has been made, by one partner, the other partner, in case of the destruction of his right, by the debtor's dying insolvent, or otherwise, is entitled to participate with the receiving partner:—but he has not such right in the case of an *annulment*.

If one of two partners in a debt *purchase* something from the debtor (such as *cloth*, for instance) in lieu of his share of the debt, then the other partner is at liberty, either to require his share of the debt from the *debtor*, (in which case all the effects take place, as described in the preceding example, where the partner requires payment from the debtor,)—or, to take an equivalent from the purchaser of a fourth part of the debt;—because he [the purchaser] has taken complete possession of his debt, since in buying and selling there is no degree of loss or disparity admitted in the things exchanged.—He therefore is responsible for a fourth part of the debt, and has no option of either giving a quarter of the debt, or a half of the cloth.—It is otherwise in a composition, because, as composition generally proceeds upon a principle of *lenity* and *abatement*, it would be an injury to the compounder to force him to give a fourth part of the debt, and therefore an option is afforded him either to give a fourth part of the debt, or the half of the article received in composition.—The non-receiving partner, moreover, is not entitled to any part of the cloth purchased, as the *purchasing* partner has become proprietor of the same in virtue of a contract of *sale*.

OBJECTION.—The cloth in question ought to be divided between the two partners, as it has been acquired in exchange for a joint debt.

REPLY.—The cloth in question has not been acquired in exchange for a joint debt, but merely in exchange for the share of the *purchaser*, in this way, that it produces a commutation of the price of the cloth for that part of the debt which is due to *him*.

One of the partners compounding his share of the debt by a *purchase*, the other may either take his share from the debtor, or an equivalent for his proportion in the receipt from the purchaser.

OBJECTION.—If the price of the cloth be a commutation of his share of the debt, it induces a partition of the debt prior to the seizure of it, which is unlawful.

REPLY.—A *wilful* partition of debt, previous to the seizure, is unlawful, but an *unintentional* partition of it (by that being *comprehended*, for instance) is lawful; and, in the case in question, it is comprehended in the validity of the sale; in the same manner as (in the *preceding* case) the partition of the debt, previous to the seizure, is interwoven with the validity of the composition.

One of two partners in a *Sillim* contract cannot compound for his share.

If two persons conclude a *Sillim* contract, (that is, advance money for goods, to be delivered at a future period,) and one of them afterwards compound his share of the goods for his share of the stock advanced, it is not lawful, according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* maintains that it is lawful, as he considers this to be analogous to any other debt; and also to a case where two persons purchase a slave, and one of them afterwards dissolves the contract with respect to his share, which is lawful; and so also in the present case.—The arguments of *Haneefa* and *Mohammed*, upon this point, are twofold.—FIRST, if the composition in question be lawful with respect only to the share of *one* of the partners, it must necessarily follow that a partition of the debt has been made prior to the seizure of it; which is unlawful; for as the debt, prior to the seizure, is not *extant*, it is impossible to discriminate part from part. If, on the other hand, it be lawful with respect to the shares of *both*, then the consent of the other must be had.—It is otherwise where two persons purchase a slave, and one of them dissolves the contract with respect to his share, because the slave in question is *extant*, and the partition of an *extant* thing is not impracticable, since part can be discriminated from part, whether *before* seizure or *after* it.—SECONDLY, if the composition in question be valid, it must follow that the right of the purchaser to the goods for which the advance has been made is annulled, and established in the capital, (that is, in the *price advanced*,) and that it afterwards reverts with respect to the goods

goods for which the advance has been made. For supposing the composition to be valid, and that one of the partners receives, in consequence, his share of the capital, the other partner has then a right to take from him his proportion of it; and the compounder again has a claim upon the other partner for a proportionate part of the goods. Hence it follows that the right of the compounder reverts, with respect to the goods for which the advance has been made, after annulment:—but an annulment cannot take place without a *dissolution*: a dissolution, therefore, is primarily established.—Now, upon his right reverting, an annulment of the dissolution is induced; and this is unlawful, as a dissolution in contracts of *Sillim* cannot be annulled.—Lawyers have observed that this case proceeds on a supposition of the purchasers having mixed together their capital: for, if their shares of the capital should not have been mixed or complicated, then (according to the first of the above arguments) the same disagreement must still subsist; since a division of the debt previous to the seizure must then also necessarily follow: but, according to the second argument, the composition is valid in the opinion of all our doctors; for, in such a case, the non-compounding partner would not participate with the compounder in that part of the capital which he receives back, as they were not copartners in the capital, and hence it does not follow that the right of the purchaser, to the goods for which the advance was made, reverts after annulment.—It is recited in the *Auzib* that this assertion concerning the unanimity of our doctors, as stated in the second argument, is not well founded; because a right to participate in the article received is founded on this circumstance, that the goods for which the advance has been made constitute a joint debt, as it arises from one contract in which they are alike concerned; and hence the non-compounding sharer has a right to participate with the compounder in whatever he may have received in virtue of their partnership in the goods for which the advance was made, whether their shares of the capital have been complicated or not.

SECTION.

Of TAKHÂRIJ.

Definition of
the term.

TAKHÂRIJ, in the language of the LAW, signifies a composition entered into by some heirs with other heirs, for their share of the inheritance, in consideration of some specific thing, which excludes them from inheritance.

Heirs may
compound
with a co-heir
for his share
of inheri-
tance, consist-
ing of land or
effects, by
any equiva-
lent;

If the estate of a person, consisting of land, or of goods and effects, be liable to be shared among several heirs; and the heirs compound with one amongst themselves for his share of the inheritance, by giving him some specific article, such composition is lawful, whether the thing given be superior or inferior to his right; because it is possible to legalize this composition, by construing it in the nature of a sale; and also, because it is related that, in the time of *Osman, Tamâzir*, the wife of *Abdul-Rihmân*, the son of *Auf*, who had been divorced by her husband in his last illness, compounded her share of the inheritance, which was a *fourth* of the eighth, for one *half* of the fourth of an eighth; as is evident from this circumstance, that *Abdul-Rihmân*, who, besides children, had four wives, left an estate of *five millions three hundred and twelve thousand DEENARS*; and the share she received was eighty three thousand *deenars*, which is one *half* of the *fourth* of an eighth.

or, by one
precious
metal, where
the inheri-
tance is in
another pre-
cious metal.

IN the same manner also, if the estate consist of silver, and gold be given to one of the heirs as a composition,—or, if it consist of gold, and a composition be given in silver, it is valid, whether the thing given be inferior or superior, because this is a sale of one species for another,

another, and in it the condition of equality between the consideration and the return is not required.—It is requisite, however, that the subjects of the composition be mutually interchanged and taken possession of by the parties at the place where the contract of composition is concluded; for this is a *Sirf sale*, and in it mutual seizin at the meeting is a necessary condition.—But if the heir, in whose possession the remainder of the estate is, should deny the possession, then the former seizin suffices, because it is a seizin of responsibility, (since it is in the nature of usurpation,) and may therefore stand for a seizin of composition.—If, on the contrary, he should *acknowledge* the possession, then it is necessary that a new seizin be made; because the seizin, in that case, being in the nature of a *trust*, and consequently unattended with responsibility, is weak in comparison with a seizin of composition, which is attended with responsibility, and therefore cannot be substituted in the place of it.

If the estate consist of *gold, silver, goods, and effects*, and the heirs compound the share of one amongst themselves for *silver* or for *gold*; it is in that case requisite that the gold or silver given in composition be somewhat greater than his share of the gold or silver by inheritance, in order that, after opposing an exact equality of the two similar species to each other, there may remain some excess to oppose as a composition for his share of the other articles, to the end that the imputation of usury may be avoided.—In this case, also, it is requisite that possession be taken, *at the meeting*, of the thing opposed to his share of the gold or the silver, because the composition to that extent is considered in the nature of a *Sirf sale*.—If, in the case in question, the composition be made for *goods and effects*, it is lawful, *absolutely*,—that is, whether seizin be made by the parties at the meeting, or otherwise,—and whether the thing given in composition be *inferior* or *superior* to the share of the inheritance.

An inheritance of *bullion and effects* may be compounded for by *gold or silver*; but this gold or silver must exceed the share of the same metal inherited; and the heir must be put in possession of such excess at the time of adjusting the composition.

If

An inheritance of money may be compounded for by money; each species being opposed to the other respectively.

If the estate consist of *dirms* and *deenars*, and the composition also consist of *dirms* and *deenars*, it is lawful, whether the amount given in composition exceed or fall short of the share of inheritance compounded for, because each kind is opposed to its opposite, in the same manner as in *sale*.—It is a requisite, however, that the seizure be made at the meeting, because the composition in question is in the nature of a *Sirf sale*.

The inheritance of a debt cannot be compounded,

except by the heir agreeing to release the debtor from his proportion;

or by the other heirs paying him that proportion gratuitously;

or lending it to him, to transfer to the debtor.

If there be a debt due to the deceased, and it be included in the composition,—by the compounding heir giving up his share of it, and agreeing that it shall go entirely to the other heirs, such composition is null;—because in this case the heir renders the other heirs proprietors of his share of a *debt*, which is unlawful, as the property of a debt cannot be conveyed to any but the person indebted.—The composition, therefore, is null;—because it is null in that part which relates to the debt; and when a contract is null in *part*, it becomes null in the *whole*,—since where a contract is invalid with respect to a *part* of its subject, it is invalid *in toto*.—If, however, the composition be made on this condition, that the compounding heir shall release the debtor from his share of the debt, and that the others shall not exact it, the composition is valid, as it is either an *annulment* of the debt, or a conveyance of it to the debtor.—This is one expedient for legalizing the composition.—Another expedient is, by the heirs paying, in a *gratuitous* manner, to the compounding heir, the share of the debt which is due to him, and then making a composition with him for his share of the collected part of the estate.—In both these expedients, indeed, an injury results to the other heirs:—in the *latter*, evidently, as there they pay his demand, out of their right, without any return;—and in the *former*, because it is possible that they may never receive the debt, nor any part of it, from the poverty of the debtor. The best expedient, therefore, is that the heirs *lend* the compounding heir the amount of his share of the debt, and then compound with him for his

his share of the collected estate; and that he then transfer the said loan to the debtor, in order that the other heirs may lawfully receive from the debtor the share of the debt which is due to him.

If there be no debts due to the estate of the deceased, and it be not known of what species the articles of the estate consist, and one of the heirs compound his share for articles of weight, or measurement of capacity,—some have said that this composition is not lawful, because of the semblance it bears to usury.—Others, however, maintain that it is lawful, as the semblance to usury is dubious in this instance; for, in the first place, it is possible that the articles may consist of articles of weight and of measurement of capacity, and it is also possible that they may *not*;—and, in the next place, if they do consist of such articles, it is possible that the quantity of the composition may be unequal to his right, and it is also possible that it may be equal to it.—The semblance to usury is therefore dubious; and regard is had to an *actual* semblance only, not to a *dubious* semblance.

Case of composition of an inheritance, where the particulars of the estate are not known.

If the estate consist of something else than articles of weight or measurement of capacity, but of which the particular substances are unknown, and one of the heirs compound his share for articles of weight or measurement of capacity,—some have said that this is unlawful; because the composition, in this case, is in the nature of a *sale*, or an *exchange of property for property*; and this is not lawful when one of the articles opposed in exchange is uncertain. The most approved opinion, however, is, that it is lawful; since the uncertainty here cannot be productive of strife, inasmuch as the thing for which the composition is made, and which is the subject of the uncertainty, is in the hands of the rest of the heirs.

Case of the same, where the particulars are only known in part.

If the estate be completely overwhelmed with debt, neither composition nor division of it amongst the heirs is lawful; because the heirs are not, in this case, masters of the property, as in-

The inheritance of an insolvent estate can

neither be
compounded
for nor dis-
buted.

heritance takes place only with respect to such property as is unincumbered with some essential requisite of the deceased; and the payment of the debts of the deceased is one of his essential requisites. If, also, the estate be *not* completely overwhelmed with debt, it is not even then becoming to enter into any composition until the debts be discharged. Lawyers, however, have said that if, in such case, a composition or a division be made, prior to a discharge of the debts, it is valid.—*Koorakbee*, in treating of partition, observes that it is not valid according to a favourable construction of the law; but that it is valid upon the principle of analogy.

H E D A R A.

B O O K XXVII.

Of Mozâribat, or Copartnership, in the Profits of Stock and Labour.

MOZÂRIBAT is derived from *Zirrib*, and means, in its literal sense, *to walk on the ground*. In the language of the LAW, *Mozâribat* signifies a contract of copartnership, of which the one party (namely, the proprietor) is entitled to a profit on account of the *stock*, he being denominated *Rabbi Mál*, or proprietor of the stock, (which is termed *Rás Mál*;) and the other party is entitled to a profit on account of his labour; and this last is denominated the *Mozârib* (or manager,) inasmuch as he derives a benefit from his own labour and endeavours. — A contract of *Mozâribat*, therefore, cannot be established without a

Definition of
the term.

A participa-
tion in the
profit is an

essential of
the contract.

participation in the *profit*; for if the whole of the profit be stipulated to the *proprietor of the stock*, then it is considered as a *Bazât*; or, if the whole be stipulated to the immediate *manager*, it be considered as a loan.

Chap. I. Introductory.

Chap. II. Of a Manager entering into a Contract of *Mozâribat* with another.

Chap. III. Of the Dismissal of a Manager; and of the Division of the Property.

Chap. IV. Of such Acts as may be lawfully performed by a Manager.

Chap. V. Of Disputes between the Proprietor of the Stock and the Manager.

C H A P. I.

Contracts of
Mozâribat
are lawful.

CONTRACTS of *Mozâribat* are authorized by the LAW from necessity; since many people have property who are unskilled in the art of employing it; and others, again, possess that skill without having the property:—hence there is a necessity for authorizing these contracts, in order that the interests of the rich and poor, and of the skilful and unskilful, may be reconciled:—moreover, people entered into such contracts in the presence of the prophet, who did not prohibit, but confirmed the same: several of the companions, also, entered into these contracts.

WHATEVER

WHATEVER may be given by the proprietor of the stock to the manager is considered as a *trust*, because the manager takes possession of the same *at the desire of the proprietor*, and neither with a view to purchase nor to pawn.—The manager is also an agent on the part of the proprietor in regard to the employment of the stock, as he acts in that respect by the orders of the proprietor. Whenever, therefore, any profit is acquired, the proprietor and the manager are joint sharers in it, inasmuch as it proceeds jointly from the *stock* of the one, and the *labour* of the other.

The stock is a *trust* in the manager's hands.

WHEN a contract of *Mozâribat* is invalid, it is, in effect, an *invalid hire*; because, as the manager acts for the proprietor, with regard to his stock, the profit which is stipulated to him is similar to *hire* for his *labour*. The contract of *Mozâribat*, therefore, where it is invalid, bears the construction of an *invalid hire*; and such being the case, the manager is entitled only to a hire adequate to his labour*.

If the contract be of an invalid nature, the manager, in lieu of profit, receives an adequate *hire*.

If the manager should oppose the proprietor, he is then held to be an *usurper*, since he wilfully transgresses with respect to the property of another.

A manager, opposing the proprietor, stands as an *usurper*.

CONTRACTS of *Mozâribat* are valid only with respect to stock in which contracts of copartnership are valid; namely, *dirms* and *deenars*, (according to *Haneefa*,) and also *current Faloos*, (according to the two disciples,) as has been already treated of at large, under the head of *Partnership*.—Hence if a proprietor of stock should give goods or effects to another, and desire him “to sell them, and then to act “as a *Mozârib* with regard to the price †,” the contract of *Mozâribat*

A *Mozâribat* holds only in such stock as admits of partnership.

* To understand this it may be proper to remark, that where a contract of hire is rendered invalid by the invalidity of any of its *conditions*, the person hired is entitled only to a hire proportionable to the subject, and not to the hire stipulated in the contract.

† That is, “to employ them in trade, in the manner of *MOZARIBAT*.”

would

would in such case be lawful, because it is not referred to the *goods* or *effects*, but to the *price* of these, and this is a thing respecting which a contract of *Mozâribat* is valid.—In regard to his referring the contract to a price at a *future period*, it is lawful to do so in contracts of *Mozâribat*; because such contracts are either in the nature of a *commission of agency*, or of *hire*; and neither of these is preventive of the validity of a reference to a future period.—In the same manner, also, if the proprietor should say, “receive the debt due to me by a particular person, and act as manager with regard to it;” the contract of *Mozâribat* is then lawful, because, by being referred to the period of seizure, it relates to *substance* and not to *debt*, and it is lawful to refer it to a future period, for the reason above mentioned.—It is otherwise, however, where the proprietor of the stock says, “act as a *Mozârib* with respect to the debt *due by you* ;” for this is not lawful either according to *Haneefa* or the two disciples:—according to the *former*, because he holds an appointment of agency of this nature to be unlawful, (as has been before explained in treating of *agency* and *sale*;) and also according to the two disciples, because, although such an appointment of agency (as they hold) be lawful, yet as a thing purchased by a person so instructed is the property of the *instructor*, it follows that the contract of *Mozâribat* relates to *goods* and *effects* *, and is accordingly unlawful.

It requires
that the pro-
fit be deter-
minate.

It is one of the conditions of a contract of *Mozâribat*, that the profit of the proprietor and the manager be indeterminate; that is to say, that neither of them be entitled to a specific number of *dirms*: for if the condition of a specific number of *dirms* be stipulated with respect to one or other of the parties, the partnership between them with respect to the profit ceases to exist, since it is possible that the whole profit might not exceed the number fixed, and it is essential that they be *partners* in the profit. If, therefore, ten *dirms*

* Arab. *Rakht woo Mattâa*, as distinguished from *Mâl*. See Vol. I. p. 28.

(for instance) be fixed as the portion of one of the parties, the manager is entitled to an hire adequate to his labour, because the contract of *Mozâribat* has become invalid, since it is possible that the whole profit acquired may not exceed the amount fixed, in which case there could be no *copartnership* with respect to it.—The manager is, in this case, entitled to an *adequate hire*, because his object in his labour was to receive *a return*, and he is prevented from receiving such return by the invalidity of the contract; it is therefore indispensable that he be paid an *adequate hire*.—In regard to the profit which in such case may be acquired, it goes to the proprietor, being considered as the offspring of *his property*.—This is the law in every case of an invalid contract of *Mozâribat*.—It is to be observed that an *adequate hire*, in the case of an invalid contract of *Mozâribat*, cannot, in the opinion of *Aboo Yoosaf*, exceed the quantity stipulated. According to *Mohammed*, on the contrary, whatever may be adequate, without any regard to the quantity stipulated, must be given; as has been already explained in treating of *partnership*.—In a case where the contract proves invalid, an *adequate hire* is declared, in the *Rawâyet Affel**, to be due, although no profit should have been acquired, because the hire of a hireling is due upon the delivery either of *profit* or of *labour*, and the delivery of *one* or *both* of these here takes place.—It is recorded from *Aboo Yoosaf* that nothing in such case is due, because of its analogous resemblance to a *valid* contract of *Mozâribat*;—that is to say, as in a *valid* contract of *Mozâribat* nothing is due to the manager in the event of there being no profit, so, if the contract be invalid, nothing is due to him *a fortiori*.—It is further to be observed that the stock of an invalid contract of *Mozâribat* is not to be replaced or accounted for in case of its loss or destruction;—that is to say, indemnification is not incumbent upon the manager;—because, as there is no responsibility for a loss of stock in a *valid* contract, so neither is there any in an *invalid* contract; and also, because, as the manager in the case of an invalid contract is only

* The original traditions. A law-book so called.

a *hireling*, and the flock remains in his possession merely that he may employ it, no indemnification is due from him on account of its destruction.

and not subjected to any uncertainty :

ANOTHER requisite, in contracts of *Mozâribat*, is that there be no condition creative of an uncertainty with respect to the profit ; for such a condition invalidates the contract, from its destruction of the object of it. Any other invalid conditions, however, excepting this, or such as are opposite to the nature of the contract, do not invalidate the contract, but of themselves fall to the ground, as in the case of a condition of loss to the manager, (where it is stipulated that “ what-
“ ever profit may accrue shall be shared between the proprietor and
“ the manager, according to their agreement ; but that if any loss re-
“ sult, it shall fall entirely on the manager.”) The contract of *Mozâribat*, therefore, is not annulled by the stipulation of conditions of this nature, but the condition itself is null ; because, as the condition is merely *redundant*, and is neither productive of a dissolution of the partnership, nor of uncertainty with respect to the profit, the contract of *Mozaribat* is not thereby rendered invalid ; in the same manner as agency does not become invalid from the invalidity of its conditions.

that the flock be completely made over to the manager :

ANOTHER requisite in *Mozâribat*, is that the proprietor deliver over the flock to the manager, and retain no seizure of it, because it is in the manager's hands in the nature of a *deposit*, and must therefore be in his sole possession, and in no respect in possession of the proprietor. It is otherwise in a contract of *partnership* ; because, in a contract of *Mozâribat*, the property is supplied by the *one* party, and the labour by the *other* ; whence it is indispensable that the property remain entirely with the manager, in order that he may be competent to perform the necessary labour with regard to it ; whereas, in *partnership*, the labour is supplied by *both* parties ; whence, if it were stipulated

pulated that the property shall remain entirely with one of the parties, a contract of partnership would not be established.

A CONDITION of management by the proprietor of the stock invalidates a contract of *Mozâribat*; because, where such a condition exists, the stock can never be possessed solely by the manager, wherefore he cannot be competent to act with respect to it, and thus the object of the contract (namely, a participation in the profit) cannot be effected;—and this, whether the proprietor be of sound understanding or otherwise, (such as an infant,) because, as the possession of the stock is established in the proprietor in virtue of his right of property, so long as it continues in his possession no delivery of it to the manager can be certified.—In the same manner, also, if one of two *Mozâribat* partners, or one of two *Aindn* partners*, deliver stock to any person in the way of a *Mozâribat*, and stipulate that the other partner shall also engage in the management of it, such contract of *Mozâribat* is null,—because the other partner is also a proprietor of the stock in question, although he be not a party to the *Mozâribat* agreement.

A condition of management by the proprietor invalidates the contract;

If the contractor of a *Mozâribat* agreement be not the proprietor of the stock, and stipulate that he also shall unite with the *Mozârib*, or manager, in the management of the stock, such agreement or contract is invalid, where the contractor happens to be incompetent,—that is, where he is a person who (like a *priviledged slave*) cannot lawfully undertake the management of stock, in the way of *Mozâribat*.—Where, therefore, a *priviledged slave* gives stock to another to manage in the way of *Mozâribat*, stipulating that he shall, conjunctly with the manager, act with regard to the stock, for a proportion of the profit, the contract is invalid, because although the slave be not actual proprietor of the stock, yet as he has a possession of it, with the power of employment, he is held to be the same as the proprietor,

and so also, a condition of management by the contracting party, although he be not the proprietor,

* See *Partnership*, Vol. II. p. 311.

unless he be
competent to
undertake it.

and therefore his possession of it is destructive of the validity of the contract.—But if the party be competent to receive stock, and act as a manager, then the contract in question would not be invalid;—as where, for instance, a *father*, or a *guardian*, gives the property of his infant charge to any person, to manage in the way of *Mozâribat*, stipulating that he himself, in exchange for a certain share of the profit, shall join in the management of the stock;—in which case the contract is valid; because, such a person being himself entitled to undertake the management of the infant's property, in the way of *Mozâribat*, is equally entitled to join in the management of it in the way of *Mozâribat*, with others.

The manager
is at liberty to
act with the
stock accord-
ing to his own
discretion,

As contracts of *Mozâribat* are *absolute*, that is to say, are not restricted to *time*, *place*, or other circumstances, it is therefore lawful for the manager to purchase or sell, or to eat of, or travel with, the stock: or to lodge it, either as a *Bazât* or a *deposit*; because the contract is unrestricted; and the object of it is the acquisition of profit; and as this cannot be accomplished but by *trade*, the contract of course extends to every occurrence in commerce; and the appointment of an agent, or the giving property by way of *Bazât*, or the deposit of property, are all occurrences of commerce;—and in the same manner, *travelling* is evidently so, because a trustee, who has no power of action with respect to his trust, has yet a power of travelling with it, and therefore a manager, who has the power of action with regard to the stock, is entitled to travel with it *a fortiori*:—besides, the word *Mozâribat* in itself implies this power, as it is derived from *Zirrib*, which signifies *to walk on the ground*, or, in other words, *to travel*.—It is recorded from *Abou Yoosaf* that a manager is not at liberty to travel; and he has also related an opinion of *Hanefsa*, that if the proprietor should give the stock to the manager in his own city, the manager is not in that case at liberty to travel, because to travel with property is an unnecessary endangerment of it; but that, if the proprietor give the stock to him in some *other* city than his own, he

may then travel to his own city, because it is not likely that a man should continue always travelling; and as the proprietor knowingly gave him the stock in *another* city than his own, it may be presumed that he thereby consented to his travelling with the property to his own city.

It is not lawful for a manager to make over the stock to another, in the way of *Mozâribat*, unless with the consent of the proprietor, or unless he should have empowered him to act according to his own judgment and discretion; because a thing cannot include its *like*, since both being of equal force, one cannot yield to the other.—Hence it is necessary either that an express permission should have been given, or an absolute and discretionary power have been delegated.—This case, therefore, is similar to that of the appointment of an agent; for one agent has not the power of appointing another agent, unless the constituent should have said “act according to your own judgment and discretion.”—It is different with respect to the *depositing* of property, or giving it by way of *Bazât*, because these acts are lawful to a manager, as they are of a nature inferior to a contract of *Mozâribat*, and a thing may include its inferior.

but he cannot entrust it to another in the manner of *Mozâribat* without the proprietor's consent;

It is not lawful for a manager to grant a loan to any one out of the *Mozâribat* stock, although the proprietor may have said to him “act according to your own discretion;” because the proprietor of the stock, in giving this discretionary power, means to give a latitude with respect to such things only as are relative to *trade*; and a loan is not connected with trade, but is a gratuitous deed, in the same manner as *charity*, or a *gift*; wherefore, by giving a loan, the *object* (namely, *profit*,) cannot be obtained, since to receive back more than what is lent is not lawful.—Giving property in the way of *Mozâribat*, on the other hand, is in the nature of *trade*, and therefore a manager in such a case may give the stock which is the subject of it, by way of *Mozâribat*, to another, provided the proprietor have empowered him to

nor lend it to another, although his powers be discretionary.

act according to his judgment and discretion.—The case is the same with respect to partnership and commixture of the stock with the manager's own property;—that is to say, if the manager should commix the stock with his own property and thus become a partner therein, it is lawful, provided the proprietor have empowered him to act according to his judgment and discretion, because mixture and copartnership are in the nature of trade, and the power so given is therefore held to extend to it.

The manager cannot deviate from any restrictions imposed upon him in the contract.

IF a person give property to another by way of *Mozâribat*, and restrict his management of it to a particular city or to particular articles, it is not lawful for the manager to deviate therefrom; because this is in the nature of a commission of agency; and as restriction is attended with an advantage, it is therefore allowed to operate.—(An explanation will hereafter be given of the nature of restriction).—Neither is it lawful for the manager under such circumstances to give the stock by way of *Bazât* to another person, to be carried by him from that particular city; for as it is not lawful for the manager himself to carry it from that city, he therefore is not entitled to delegate such a power to another.

Upon violating the restriction, the manager becomes responsible for the stock.

IF the proprietor restrict the management of the stock to a particular city, and the manager nevertheless carry it to another city, and there purchase something with it, he becomes in that case responsible for the stock; and whatever he may have purchased with it becomes his property, as well as the profit which may arise therefrom; because he stands as a *usurper*, since he has assumed a power of action with respect to the property of another without that other's consent.—If, however, the manager, having carried the stock out of the particular city, should not purchase any thing with it until he had returned to the city to which the proprietor had restricted his power of action, he becomes freed from responsibility, (in the same manner as a trustee who has opposed the

the depositer becomes freed from responsibility on the cessation of such opposition,)—and the stock resumes its former nature of *Mozâribat*, in virtue of its continuance in the possession of the manager, under the original contract.—In the same manner, also, if the manager, having bought something with *part* of the stock in the city in question, should depart from it with the remaining part of the stock, and again return without having purchased any thing with it, in that case both the purchase which was at first made, and the part which was afterwards brought back, are considered in the nature of *Mozâribat*, for the reason above-mentioned.—It is to be observed that what has been here related with respect to the manager's becoming responsible upon carrying the stock to another city, and there making a purchase with it, is recited from the *Jama Sagbeer*.—In the *Mabsoot*, treating of *Mozâribat*, it is related that the manager becomes responsible immediately on carrying the stock from the prescribed city.—The more approved doctrine, however, is that the manager becomes responsible immediately on carrying away the stock from the prescribed city; and that upon his making a purchase with it in another city the responsibility becomes fixed and permanent, since there then exists no probability of his bringing it back to the prescribed city.—The condition stated in the *Jama Sagbeer*, therefore, of the manager making a purchase out of the city, relates to the confirmation of the responsibility, and not to the original birth of it, which takes place immediately on carrying the property out of the city.

If a person give stock to another by way of *Mozâribat*, on condition of his making a purchase with the said stock in the *market-place* of a particular city, the condition is invalid; because a city, notwithstanding the distinction of its parts, is yet like *one place*, and such a restriction is therefore useless.—If, however, he expressly limit the purchase to the *market-place*, by saying, “purchase with this stock “ in the *market-place*, and no where else,” a purchase made *out* of the market-place is in that case unlawful, because the proprietor in

A restriction to any particular part of a city is invalid,

unless stipulated under an express exception of any other place.

this instance has expressly declared that “he *shall not* make a purchase out of the market-place;”—and the proprietor is authorized to lay this restriction.—The *restriction* here mentioned is to be understood in the proprietor saying to the manager, “I give this stock to you on condition that you act with it *in such a manner*,”—(“that you purchase *cotton* with it,” for example;)—or, on condition that “you employ it *in such a place*;”—and so also, from his saying, “Take this stock and employ it in *Koofa*,” or, “Take this stock on condition of half the profit arising from it in *Koofa*.”—If, however, the proprietor were simply to say, “Employ this stock in *Koofa*,” the manager may then employ it in *Koofa* or out of *Koofa*.—The proofs, upon these points, are connected with *Arabick grammar*.

The manager may be restricted, in his transactions, to particular persons.

If the proprietor say to the manager, “Take this stock, on condition that you purchase and sell with it with a particular person,” such restriction is valid, being founded on the particular credit in business of the person to whom it relates.—It is otherwise where he says “Take this stock on condition that you purchase with it from the people of *Koofa*,” or “sell it to them;”—or, “Take this stock for a *Sirf*-sale, on condition that you purchase with it from *Sirráfs*, [bankers] or sell it to them;”—for if the manager, (in the former instance,) sell the stock in the city of *Koofa*, to a person who is not an inhabitant of that city, or (in the latter instance) sell it to some one who is not a *Sirráf*, his act is lawful;—because the *first* of these restrictions is merely a restriction in point of *place*; for as the people of *Koofa* are all different in regard to their judgments and manner of transacting business, the restriction to them *in general* could be attended with no advantage, whereas the restriction to the *place* is advantageous in regard to the preservation of the stock: and the *second* of these restrictions is a restriction to a *particular mode* of sale; for as he did not confine the restriction to any one individual, but to a particular set of people who prosecute the business of

of *Sirrâf**, it is evident that the restriction was meant merely to a *Sirf* sale.—Such is the meaning, in common acceptation, of the restriction in these two particular cases; but not in others.

If the proprietor limit the *Mozáribat* to a particular period, the contract becomes null at the expiration of that period; because, as this is a *commission of agency*, its continuance is therefore restricted to the period specified; and as the restriction of its duration may be advantageous, it therefore operates in the same manner as a restriction to a particular *place*, or to a particular *mode of sale*.

The contract may be restricted, in its operation, to a particular period.

A MANAGER is not at liberty to purchase, with the stock, a slave, who would become free by being transferred to the proprietor, whether from the circumstance of *affinity*, or from any other cause, (as if the proprietor had already *vowed* to emancipate him,)—because the contract has been made with a view to the *acquisition of profit*, which can be obtained only by *repeated acts*, such as previous *purchase* and subsequent *sale*; and to this last the freedom of the slave operates as a bar:—and for this reason the purchase of all such things as do not become *property* in virtue of *seizin*, (such as *wine* or *carrion*), is not comprehended in a *Mozáribat* contract. (It is otherwise with respect to the purchase of a thing under an *invalid sale*; for this is comprehended in a *Mozáribat* contract, since the manager may lawfully sell that thing again after *seizin*; and consequently profit, which is the object of the contract, may in that case be obtained.)—If, therefore, a manager purchase a slave who becomes free with respect to the proprietor of the stock, such purchase is not included in the *Mozáribat* stock, but is considered to have been made for the ma-

Nothing can be purchased, by the manager, which is not a subject of property, in virtue of *seizin*, with respect to the proprietor.

* *Sirrâf* is derived from *Sirrîf*, which signifies a *pure sale*, or the act of exchanging one sort of *specie* for another: hence *Sirrâf* means not only a *banker* or *money changer*, but also any one whose dealings are of that nature, and consequently a negotiator of *Sirf* sales.

nager himself: for the bargain being valid with respect to the purchaser, is therefore effectual with respect to him, in the same manner as in the case of an agent for purchase who opposes his constituent.

The manager cannot purchase a slave, free with respect to himself, where any profit has been previously acquired upon the stock.

It is not lawful for a manager to purchase a slave who is free with respect to the manager himself, where a profit has been gained upon the stock; because the share of the manager (namely, *in the profit*) would in this case become emancipated from the *whole stock*, and consequently the share of the proprietor would be vitiated*, according to *Haneefa*. (The two disciples hold that it would become *emancipated*, because of the known difference of their opinion from that of *Haneefa* concerning the *divisibility* or *indivisibility* of *manumission*.)—Now, where a slave becomes emancipated, either wholly, or in part, he is no longer a lawful subject of sale; and consequently the *end* of the contract (namely, the acquisition of profit,) cannot by this means be obtained. Hence it is not lawful for a manager, where a profit has been gained upon the stock, to purchase a slave who, with respect to himself, becomes free.—If, however, he should make this purchase, under such a circumstance, he becomes responsible for the amount of the *Mozâribat* stock so expended, because he is then held to have made the purchase for himself, and he has paid the price out of the stock.—But if there have been no accession of profit to the stock, the manager may lawfully purchase a slave that is free with respect to himself, because there exists no bar, in this case, since the manager has no share in the purchase†, so as to render his portion in the slave free.—And if, after the purchase, a profit should arise, from the slave

* Because the slave, by becoming free *in part*, is rendered unfaleable, and obtains a claim to freedom. (See *Manumission*.)

† For, as no profit has been, as yet, gained upon the stock, and as the *profit* is the only thing in which the manager has any share, it follows that no part of the *manager's* property is expended in the *purchase*.

increasing

increasing in value, the manager's portion of the slave, involving his share of the profit, is emancipated; and he is not, in this case, in any respect responsible to the proprietor of the stock*, because neither the increase of the value, nor the share acquired by the manager, were effected by his means, but operated of themselves independent of his will or endeavour. Hence this case is the same as where a person becomes heir to a *relation*, or to some one else; as if a wife should purchase the son of her husband, and should afterwards die, leaving behind her husband and brother; in which case the child becomes free, and the father is not in any degree responsible; and so also in the case in question.—(It is to be observed that the slave in question must perform emancipatory labour to the proprietor of the stock, to the amount of his share in him, as the proprietor's property is involved in his person; he must therefore perform emancipatory labour, in the same manner as in a case of *inheritance*.)

If a person give one thousand *dirms* to be managed, in consideration of a moiety of the profit, in the way of *Mozâribat*, and the manager purchase, for the thousand *dirms*, a female slave of the value of these thousand, and afterwards have carnal connexion with her, and she in consequence produce a child also valued at one thousand *dirms*, and the manager claim the child, and the child afterwards increase in value to fifteen hundred *dirms*, in this case the proprietor of the stock has it at his option either to claim emancipatory labour from the slave [the manager's child] to the amount of one thousand two hundred and fifty *dirms*; or to emancipate him: but the manager does not owe any indemnification to the proprietor for his share, though he be rich. The reason of this is that there is a presumption of the validity of the claim here made, since it is possible that the female slave may be the *wife* of the manager, by her former proprietor having first contracted

Case of the manager purchasing a female slave, and begetting a child upon her.

* That is, he owes him no indemnification for the vitiation of his property in the slave from this circumstance.

her in marriage to him, and afterwards sold her to him in behalf of the *Mozâribat* stock; and that the child which she produced may have been the issue of his cohabitation with her:—but his claim to the child was not effectual, (that is to say, the child was not emancipated,) because the condition of its emancipation (namely, his right of property in the slave) did not in any respect appear, as no profit had as yet arisen from her; for the value of each (namely, of the mother and child) was exactly equal to the amount of the stock, and consequently no profit existed in either of them; in the same manner as where the *Mozâribat* stock consists of different substances, and the value of each substance is equal to the stock,—in this way, that a person purchases, with a stock of one thousand *dirms*, two slaves, and each of them afterwards becomes worth one thousand *dirms*,—in which case no profit is held to exist in either of them; and so also in the case in question;—and as no profit appears, it follows that the manager obtains no share whatever in either the slave or the child, and consequently that his claim is invalid: but upon the child exceeding the stock in value, a profit then appears, and consequently the claim formerly made then becomes valid.—It were otherwise if the manager were first to emancipate the child*, and afterwards the value of him to rise, for this emancipation would be altogether invalid, (that is to say, would be ineffectual *after* the appearance of profit, as well as *before*,) because the liberation is an indication of manumission, and the indication being null at the time, from non-existence of a *present* right of property†, cannot afterwards become effectual in consequence of a *supervient* right; whereas *claim*, on the other hand, is an express *notification*, and hence may lawfully be admitted as effectual, in consequence of a *supervient* right;—(in the same manner as where a person, having declared the slave of another to be *free*, afterwards purchases him; in

* That is to say, “ *it were otherwise if the manager’s claim (involving the emancipation of the child) were first admitted, &c.*”

† As the manager acquires no right of property in the child until such time as a profit be obtained upon it.

which

which case the slave, after the purchase, becomes free, in virtue of the previous declaration;)—and the claim being effectual after the existence of profit, and the *parentage*, also, being established, it follows that the child is free, in virtue of the manager's right of property in a part of him: and no compensation for any part of his value is due from the manager to the proprietor of the stock, whether the manager be rich or poor; because the freedom of the child is established in virtue of the parentage, and also in virtue of the manager's *right of property*; (that is to say, in virtue of *both*:)—but as the right of property is established *subsequent* to the parentage, the freedom is therefore referred to the *right of property*, which takes place independant of the will and endeavour of the manager, and in which therefore he is guilty of no *transgression*; and as the indemnification for emancipating a slave* is an *indemnification for damages*, it is not due but in a case of *transgression*.—The proprietor of the stock is entitled, on this occasion, to demand emancipatory labour of the male slave, because the property which he had in him remains, as it were, *detained* in him;—and he is also at liberty to *emancipate* him, because a slave who owes emancipatory labour is (according to *Haneefa*) like a *Mokâtib*; and the proprietor is therefore empowered to emancipate him.—If the proprietor require the *labour*, the slave must perform it to the amount of *one thousand two hundred and fifty dirms*; for the proprietor is entitled to *one thousand* on account of *the stock*; and the remaining five hundred, which is the *profit*, is equally shared between him and the manager; the *labour*, therefore, must be performed to the amount above stated; and upon the proprietor thus obtaining that amount of him, he is then entitled to take an equivalent for half the value of the *mother*; because the proprietor being entitled to *one thousand* DIRMS out of the *twelve hundred and fifty*, on account of the stock, (which claim must always

* As where a *partner* (for instance) emancipates his share in a slave, which induces his ultimate freedom *in toto*, and is therefore, in its consequence, destructive to the property of the other partners.—(See *Manumission*.)

be first satisfied,) it follows that the female slave is *altogether profit*, and is therefore equally shared between the proprietor of the stock and the manager: and as the manager formerly preferred a claim that was valid, (since there was a presumption that he might have cohabited with the female slave in virtue of marriage,) and the efficiency of which remained suspended only on account of the defect in his right of property, and became effectual on the establishment of that right, by which means the female slave becomes his *Am-Walid*,—he [the manager] is therefore responsible for the share of the proprietor, whether he be *rich* or *poor*, because the responsibility in this instance is *responsibility for assumption of property*, and a responsibility of this nature does not remain suspended on *transgression*;—in the same manner as where a person, in virtue of marriage, cohabits with the female slave of another, and a child is born of her, and this person afterwards obtains, by inheritance, a right of property in her, jointly with another person,—in which case the person in question is responsible to the other for his share; and so also in the case in question:—contrary to *responsibility for the child*, as before treated of.

C H A P. II.

Of a Manager entering into a Contract of *Mozâribat* with another.

A manager
entrusting the
stock in his
hands to a
secondary ma-

IF a manager give stock to another person, in the way of *Mozâribat*, without authority from the proprietor of the stock, in that case the first or principal manager is not responsible [for the stock] either on account

account of having so given the stock to the other, or on account of that other's employment of the same, until such time as profit shall have been acquired thereon: but whenever profit takes place, then the principal manager becomes responsible to the proprietor of the stock.—This is recorded by *Hasan* as an opinion of *Haneefa*.—The two disciples maintain that the primary manager becomes responsible, immediately upon the action of the secondary manager, whether profit may have been acquired or not: and this is agreeable to the *Zâbir Rawâyet*.—*Ziffer* holds that the primary manager is responsible for the giving of the stock to the other, whether that other may have acted with regard to it or not; (and there is an opinion recorded from *Aboo Roosaf* to the same effect;) because it is lawful for a manager to give the stock by way of a *deposit*, but not by way of *Mozâribat*; and as, in the case in question, it was given by way of *Mozâribat*, the manager was therefore guilty of a trespass, and is consequently liable to responsibility.—The argument of the two disciples is that the stock is here in reality given as a deposit; and is only rendered *Mozâribat* by the action of the *secondary* manager;—"therefore (say they) there are two circumstances in this case, and we pay attention to both circumstances, and determine, accordingly, that responsibility takes place in case of the action of the *secondary* manager; but if he do not act, and the property be lost in his possession without any transgression, responsibility is not in that case incumbent."—The reasoning of *Haneefa* is that the mere act of *giving*, previous to the *action*, is a *deposit*, and *after* the action it is an *entrusting*, in the manner of a *Bazât*; and as both these deeds are lawful to a manager, he is not consequently responsible for either of them:—but, upon profit accruing, the first manager renders the secondary one a sharer with him in the stock, and is therefore responsible in the same manner as if he had mixed the stock with the property of another, in which case he would have become responsible in consequence of his having rendered that other a sharer in the stock; and so also in the case in question. All this proceeds on a supposition of both the *Mozâribats* being

nager, is responsible to the proprietor, upon any profit being acquired on it.

being *valid*: but if one or both of them be invalid, then the primary manager is not responsible, though the secondary manager should have acted with regard to the property; because, in such case, the secondary manager is considered as a *hireling*, entitled to an adequate *hire*, and not to any share in the *profit*. *Mohammed*, in the *Mabsoot*, observes that, in case of the validity of the *Mozâribat*, the primary manager becomes responsible; but he has not stated the consequences with regard to the *secondary* manager.—Some have said that he is not responsible, according to *Haneefa*, and that he is so, according to the two disciples; proceeding on the different opinions which they have maintained with regard to the trustee of a trustee,—*Haneefa* holding the *principal* and not the *secondary* trustee to be responsible; and the two disciples holding the proprietor to be at liberty to take the compensation from which ever he chuses; and so also in the case in question.—Others, again, have said that the proprietor is at liberty, in the opinion of all our doctors, to take a compensation either from the *principal* or the *secondary* manager; and this is the common opinion.—This is evidently the opinion of the two disciples, because, according to them, a secondary trustee is responsible:—and it is also evidently agreeable to the opinion of *Haneefa*; because the principal manager was guilty of a transgression, in giving the stock to the secondary manager without the proprietor's permission; and the secondary manager was also guilty of a transgression, in taking possession of the property of another without his consent.—Respecting the two cases of a *manager* and a *trustee*, the difference between them, according to *Haneefa*, is that the secondary *trustee* takes possession of the deposit with a view to the benefit of the *principal* trustee, and is therefore not responsible;—whereas the secondary *manager* seizes the stock with a view to his *own* profit; on which account it is proper to make him responsible. It is to be observed that, upon the primary manager becoming responsible for the stock, the contract of *Mozâribat* between him and the secondary becomes valid; and the profit is participated between them agreeably to their stipulation; because the primary
manager

manager becomes *proprietor* of the *Mozáribat* stock, in consequence of his responsibility, from the time that he exceeded his authority, by making it over to another without the owner's consent, whence it is the same as if he had so given *his own* property.—If the proprietor, on the other hand, should require the indemnification of the *secondary* manager, then the secondary must revert for satisfaction to the *primary* manager, because of their contract of *Mozáribat*, as he acts on behalf of the primary manager;—in the same manner as where a proprietor takes a compensation from the trustee of an usurper, in which case the trustee has recourse to the usurper; and so likewise in the case in question: and also, because the principal manager deceived him in the body of the contract. And in this case also the contract of *Mozáribat* between the primary and secondary managers is valid, because responsibility ultimately falls upon the *primary* manager, and it is therefore the same as if the proprietor had taken a compensation from him first:—but the profit, in this case, is fair and lawful to the *secondary*, and not to the *primary* manager; because the secondary is entitled to the profit on account of his management, in which there is no baseness; but the principal is entitled to profit merely from his *right of property*, which, being founded only on the payment of the compensation, is not altogether free from baseness, since a right of property merely *constructive* is in *one* shape established, but in *another* shape it is *not* established.

If a person give property to another by way of *Mozáribat*, on condition of half the profit, and with permission to him to give the property to another in the way of *Mozáribat*, and the manager, accordingly, give the said property to another by way of *Mozáribat*, on condition of a *third* of the profit; and the secondary manager employ the said stock, and acquire profit upon it, in that case, if the proprietor should have said to the first manager, “Whatever advantage “God Almighty may grant upon it is between you and me in an “equal degree,” then a half of the whole profit is due to the proprietor,

Case of a manager entrusting the stock to a secondary manager, with the proprietor's concurrence.

prietor, one third to the *secondary* manager, and one sixth to the *primary* manager;—because the act of the primary manager, in giving the stock to the *secondary* manager by way of *Mozâribat*, was lawful, as he had the consent of the proprietor thereto; but as the proprietor stipulated to himself *one half* of the whole profit, he is therefore entitled to it, and the remaining half is all with which the manager has any concern; and as he agreed to give a *third* of the whole to the secondary manager, there will remain of course only *one sixth* of the whole to him.—One half of the profit is, in this instance, fair and lawful to the two managers, although the *primary* manager has not employed himself, [with regard to the stock,] because the industry of the *secondary* manager is held to be that of the *primary*:—in the same manner as where a person hires another to make him a garment for one *dirm*; and the person so hired hires another to do the work for *half* a *dirm*; in which case, although the principal hireling does no work, yet he is fairly and lawfully entitled to the profit of an half *dirm*, as the work of the *secondary* is considered as *his* work. But if, in the case in question, the proprietor should have said, “What-
 “ ever advantage God Almighty gives to you, is between you and
 “ me in an equal degree;” then the secondary manager is entitled to one third, and the remainder is divided in an equal degree between the proprietor and the principal manager;—because, in this instance, the proprietor commits the disposal of the property to the first manager, stipulating for himself one half of the whole profit which may accrue from it; and as, by this statement, two thirds of the profit accrue, those two thirds are equally divided between the proprietor and the manager.—It is otherwise in the *preceding* case, because there the proprietor had stipulated for himself one half of *the whole* profit: hence there is an evident difference between the two cases.

If the proprietor of the stock say to the manager, “ I give this
 “ stock in order that whatever profit may result to you therefrom be
 “ equally divided between us;” and, at the same time, give him per-
 mission

mission to have it managed by *Mozâribat*, and if, accordingly, the manager entrust it to another manager with an agreement of half the profit to him, in this case one half of the profit goes to the *secondary* manager, and the other half is divided equally between the proprietor and the *primary* manager; because the primary manager has agreed to let the secondary manager have one half of the whole profit, and the proprietor of the stock having already agreed to this, the secondary manager is entitled to one half accordingly; and as the proprietor established for himself one half of the profit that might accrue to the primary manager, and *one half* only of the whole accrues to him, (as the half which goes to the secondary must necessarily be deducted,) it follows that this half is divided between them.

If a proprietor give stock to any person by way of *Mozâribat*, upon condition that, of whatever advantage may accrue thereon, one half shall come to *him*,—or that, one half of the increase, above the original amount, shall be divided equally between him and the manager,—and at the same time permit the manager to entrust the stock in the way of *Mozâribat* to another, and the manager accordingly give it to another in the way of *Mozâribat*, with an agreement of one half of the profit to him,—in that case the proprietor is entitled to one half of the profit, and the secondary manager to the other half, whilst nothing whatever is due to the *primary* manager; for the stockholder having conditioned for himself one half of the property in an absolute manner, one half therefore goes to him; and as the principal manager agreed to give one half (which is the share that would be due to himself) to the *secondary* manager, the same must therefore be given to him; hence he himself is entitled to nothing;—in the same manner as where a person hires another to make him a garment for one *dirm*, and the person so hired again hires another to do the work for one *dirm* also,—in which case the secondary hireling would be entitled to the *dirm*, and nothing whatever would be due to the principal; and so also

in the case in question.—But if the primary manager agree to give the secondary one *two thirds* of the profit instead of *one half*, then the proprietor is entitled to one half, and the secondary to the other; and the principal manager must make good to the secondary, from his own property, to the amount of one third of the profit, in order that a complete share of two thirds may be thus rendered to him; for here the *primary* manager stipulated to the *secondary* a thing which was the right of the *proprietor*; and hence, in respect to the proprietor, his agreement is of no effect, since, if such were the case, it must necessarily follow that the condition he had himself established was null;—yet there is no illegality in referring the obligation of it to his own person, since it relates to a fixed and certain object, interwoven in a contract which he was competent to make. Hence he becomes responsible for the safe delivery of two thirds to the secondary, and consequently the discharge of the same is incumbent upon him. Besides, he has deceived the secondary in the body of the contract, which is a cause of *recourse*,—that is to say, entitles the secondary to revert and have recourse to the principal;—in the same manner as where a person has been hired to make a garment for one *dirm*, and he again hires another to do the work for one *dirm* and an half,—in which case the secondary hireling is entitled to an half *dirm* from the property of the principal hireling;—and so likewise in the present case.

SECTION.

The contract may stipulate a proportion of the profit to the slave of the proprietor.

If a manager stipulate to give one third of the profit to the proprietor of the stock, one third to the slave of the proprietor, (on condition of assistance in the labour,) and the remaining third to himself, it is lawful, whether the slave be indebted or not; because the seizure of a slave is valid; (especially where he is a *Mazoon*, or *privileged*

privileged slave; and in the present case the slave is *privileged*, inasmuch as the condition of his working with the manager endows him with a privilege; and agreeably to the rule of the seizure of a slave being valid, a master is not permitted to take from a trustee the deposit which may have been made by his slave, although the slave be not *privileged*; and on the same principle, also, a master may sell any thing to his slave, provided he be *privileged*:)—and the seizure of the slave being valid, it follows that the condition of his uniting in the management is not repugnant either to the *delivery* of the stock*, or to the distinction between the *stock* and the *manager*: the condition is therefore approved†. (It is otherwise where it is made a condition that the proprietor of the stock shall himself work, because that is preventive of a delivery‡, and consequently invalid, as has been already explained.)—The contract of *Mozâribat*, therefore, being valid, one third of the profit goes to the manager, and two thirds to the proprietor of the stock; because the earnings of the slave are the property of the master, if he be not indebted; and if he be indebted they are the property of the creditors.—The doctrine here laid down proceeds on a supposition that the *master*, and not the *slave*, has concluded the contract of *Mozâribat*;—for if a *privileged* slave enter into a contract of *Mozâribat* with a stranger, stipulating that his master shall act with the manager in the management of the stock, the contract is invalid, provided the slave be free from debt; because in that case the *Mozâribat* stock is the property of the master§; and as it is stipulated that the master shall unite in the

But if a slave engage in such a contract on behalf of his master it is invalid.

* To the slave, for the purpose of management.

† If a slave were incapable of making seizure, it would follow that a delivery of the stock to the slave (for the purpose of managing it) would, in fact, be a return of it to the proprietor, his master, and consequently the contract would be rendered nugatory.

‡ Since such delivery would be a return of it to the proprietor, which would invalidate the contract.

§ Whereas, if the *privileged* slave were involved in debt, the stock entrusted by him to the manager would (in common with his other property) be the right of his creditors.

management, it is requisite that he make feizin of it for that purpose; but the feizin of the proprietor is repugnant to a due *delivery* *. If, however, the slave be *insolvent*, the contract is valid, as in that case the master stands in the same relation as a stranger, according to *Haneefa*.

CHAP. III.

Of the Dismission of a Manager; and of the Division of the Property.

The contract is dissolved by the death of either party,

If either the proprietor of the flock or the manager should die, the contract becomes null; because a contract of *Mozâribat* (as has been already explained) is in the nature of an appointment of agency; and agency ceases by the death either of the constituent or of the agent; and inheritance does not take place with regard to agency, as has been already demonstrated.

or by the apostacy and expatriation of the manager.

If the proprietor of the flock become an apostate, and be united to a foreign country†, the contract of *Mozâribat* becomes null; because his being united to a foreign country is equivalent to his *death*, (whence it is that his property is then divided amongst his heirs.)—If, on the other hand, he should *not* be united to a foreign country, the transactions of his manager remain *suspended* in their effect;—(that

* Because, as the property of the *slave* is, in effect, the property of his *master*, it follows that a delivery to the master would be nugatory.

† By a sentence of the *Kâzee*. (See *Institutes*, Vol. II. p. 229.)

is to say, if he again become a *Mussulman*, they then take effect:) but if he die in his apostacy, they then become null, (according to *Haneefa*), because his manager's transaction [with the stock] is the same as his own transaction, since the manager acts *on his own account*; and as (according to *Haneefa*) the acts of an apostate are suspended in their effect *, so, in the same manner, the acts of his *manager* are suspended.

If the *manager* become an apostate, yet the contract still continues to exist in its original state, because the actions of a person are suspended in their effect, only on account of a suspension of his right of property: but the apostate in question has no right of property in the *Mozâribat*-stock, as that belongs solely to the *proprietor* of the stock; and as the *proprietor's* right of property is not suspended, the contract of course still continues in force.

If the proprietor of the stock dismiss the manager, and he should not be acquainted with his dismissal until after he had transacted by purchase and sale, then those transactions are valid; because he acts as an *agent* on behalf of the proprietor; and the dismissal of an agent, if it be voluntary and intended, (that is to say, not *virtual*, such as by *death*), remains suspended upon a knowledge of it; for dismissal is a prohibition from action; and prohibitions, in injunctions respecting any matter, do not operate until after knowledge of them, as in the case of the commands and prohibitions of the LAW.

If the proprietor of the stock dismiss the manager, and he be apprized thereof, he may nevertheless sell such of the *Mozâribat* stock as consists of chattels and effects, because his dismissal from the agency is not preventive of a sale of articles of that kind, since he has a right to *profit*, which cannot be obtained otherwise than by a di-

If the manager apostatize, without going to a foreign country, the contract still continues in force.

All acts of the manager are valid, until he be duly apprized of his dismissal.

The manager, after being apprized of his dismissal, may still convert what remains on his

* See Vol. II. p. 253.

vision;

hands into
money :

vision; and this can be effected only by turning the subject of the stock into specie.—From this necessity, therefore, he is at liberty to sell such stock: but, after the sale, it is not lawful for him to make any purchase whatever with the price he procures for these effects; because there is no *necessity* for his so doing, and the *sale* is admitted only from *necessity*, as has been already explained.

but if it have
been already
converted
into money,
he cannot
transact with
it;
unless this
money be of
a species dif-
ferent from
the original
stock,—in
which case he
may convert
it into money
of the same
species.

If the proprietor of a stock, which had originally consisted of *dirms* or *deenars*, dismiss the manager at a time when it has been reduced to specie, and the manager be apprized thereof, in that case he is no longer entitled to act with regard to it, since there exists no further necessity for his so doing.—The author of the *Hedaya* remarks that the law here proceeds on the supposition that the stock has been converted into the very same specie with the original stock: but that, if it should have been converted into specie of a different denomination, (as if the stock had originally consisted of *deenars*, and it be now converted into *dirms*, or *vice versa*,) the manager is, by the *benevolence* of the law, allowed the liberty of selling it for the same specie as the original stock; because it is incumbent upon the manager to return a similar to the original stock, which is impracticable otherwise than by selling what he has on hand for the same specie as the original stock; and also, because, as the profit cannot be ascertained until the property on hand be converted into something of the very same nature as the original stock, the case becomes exactly the same as if the property consisted of goods and effects.—It is to be observed that all the rules here laid down with respect to the *dismissal* of a manager are applicable to the case of the death of the proprietor of the stock.—Thus, if the proprietor should die, the manager is entitled to sell the *Mozaribat* stock, where it consists of goods and effects:—but he is not allowed afterwards to purchase any thing whatever with the price so obtained. If, on the other hand, the stock has been turned into *dirms* or *deenars*, he is not entitled to act with respect to it, provided the money into which it is converted correspond with the specie of the original stock:

stock: but if it be *different* from the specie of the original stock, he is at liberty to convert it, by sale, into the same specie with the original.

If the proprietor and the manager dissolve the contract, and the stock should at that time consist of debts due from others, in this case, where any profit has been acquired, the magistrate must compel the manager to possess himself of these debts; since he is held to be equivalent to a *hireling*, and his profit to be like *hire*. But if no profit have been acquired, it is not incumbent upon the manager to receive payment of these debts; since he is merely a *voluntary agent*, and no compulsion can be used for the fulfilment of a *voluntary engagement*; (as where a person makes a grant to another without delivering the thing granted, in which case the donor cannot be compelled to make delivery of the grant.) The manager, however, is in this case to be instructed to appoint the proprietor agent in his behalf for the receipt of these debts; for as the rights of the contract appertain to the contractor, it is indispensably necessary that he thus appoint the *proprietor* his agent, to prevent the loss of his right. *Mohammed*, in the *Jama Sagbeer*, observes that "the manager ought to be instructed "to make a transfer of his claim upon the debtors to the proprietor;" the meaning of which also is, that he should appoint the proprietor his agent for the receipt of the debt; because if such transfer were sufficient, the proprietor must necessarily be injured in case of the debtors not acceding to the same. It is to be observed that this is the rule in all cases of *agency*. Thus, when an agent *for sale* (for instance) is dismissed, he must be told to appoint his constituent agent for the receipt of the debt, in the manner above mentioned. A *broker*, however, must himself be compelled to receive any debts that may be due, because with *brokers* the custom is to act for *hire*.

WHATEVER may be lost or destroyed, of the *Mozáribat* stock, must be placed to the account of the *profit*, and not of the *original stock*, because

If, at the dissolution of the contract, the stock consist of debts, the manager must be compelled to collect them, where any profit has been acquired.

All loss upon the stock is placed against the profit.

because the profit being a dependant, it is most eligible to refer the loss to it; in the same manner as a loss in property subject to *Zakât* is referred to what is *exempt**, and not to the actual *Nisâb*, as the *exempt* property is a dependant of the *Nisâb*.

If more than the profit be lost, the responsibility does not fall on the manager, as he is merely a trustee.

If the profit be divided previous to a restoration of the capital, and any accident afterwards befall the stock, the manager must return the portion of profit he had received.

If the stockholder and the manager divide the profit between them, and continue the contract in existence as before, and the whole or part of the stock be afterwards lost, the manager must, in that case, return the profit to the proprietor, in order that he may appear to recover this capital; because a division of the profit previous to a restoration of the capital is not valid, since the profit cannot be ascertained until the proprietor shall have recovered his capital; for the capital is the *principal*, and the profit the *dependant*; and hence, when what remained in the hands of the manager is lost or destroyed, as he is in this case subject to no responsibility, (it being only a *trust* with him,) it follows that what he and the proprietor had before taken possession of is *capital*, and consequently that he is responsible for the portion he had taken, and that the portion taken by the proprietor is also accounted as *part of the capital*.

The manager is not responsible for deficiency.

If, when the proprietor has received back the whole capital, any excess remain, such excess must be divided between him and the manager, as being profit; but if there be a *deficiency*, no compensation is due from the manager, as he is only a *trustee*.

The profit received by the manager is no way implicated, with

If the manager and the proprietor, having divided and taken the profit, and annulled the contract of *Mozâribat*, should again enter into a new contract of *Mozâribat*, and the stock be afterwards lost,

* Arab. *Afoo*.—See Vol. I. p. 120.

in this case the profit gained upon the first *Mozâribat* is not to be returned to the proprietor, because that *Mozâribat* was completed, and the second *Mozâribat* is a *new contract*;—and the destruction of the stock of the second *Mozâribat* cannot affect the *first*;—in the same manner as if the proprietor should have given some *other* property than that which was the subject of the former contract to the manager; in which case, if the said additional property should be lost, it does not affect the contract; and so also in the case in question.

respect to any
new contract
between the
same parties.

CHAP. IV.

Of such Acts as may lawfully be performed by
a Manager.

It is lawful for a manager to sell the stock either for ready money, or upon trust; because these acts are in the nature of *traffic*, and, as such, are included in an absolute contract.—The period of trust, however, must not be extended beyond what is customary amongst merchants, (such, for instance, as a period of *ten years*;) because he is only permitted to act according to the common practice and custom of merchants; whence it is that he may lawfully *purchase* a *quadruped* for conveyance; but he can only *hire* a *boat*; for such is the custom amongst merchants.

A manager
may sell the
stock, either
for ready
money, or
upon trust:

ACCORDING to the *Rawâyet Masbhoor*, a manager is at liberty to give the privilege of trading to a slave whom he may have purchased with the stock, since this is in the nature of *traffic*.

or entrust a
slave with the
management
of it:

or (having
sold it for
ready money)
may grant a
suspension of
payment:

If a manager should sell part of the stock for ready money, and afterwards admit of a suspension in the payment, it is lawful, according to all our doctors:—according to *Haneefa* and *Mohammed*, because, as an *agent* is permitted to grant a suspension of payment, a *manager*, as having a share in the profit, is entitled to do so *a fortiori*; (the manager, however, is not responsible, because, as he has a power of dissolving the sale, and afterwards selling the thing *upon trust*, the deferring of payment is accordingly lawful: contrary to an *agent*, as he is responsible to his constituent for the price of what he sells, because he is not at liberty to dissolve a sale and sell the article over again *upon trust*:)—and according to *Abou Yoosaf*, because a manager may, if he please, annul the sale, and sell the article over again: contrary to an *agent*, who has no power of dissolving a sale.

or allow the
purchaser to
transfer the
payment upon
another per-
son.

If a manager should sell something to *Zeyd* upon trust, and *Zeyd*, with the consent of the manager, should transfer the payment of the price upon *Omar*, this is lawful, whether *Omar* be *rich* or *poor*, because transfer of debts is customary amongst merchants.—It is otherwise where a guardian assents to such a transfer with respect to the property of his orphan ward, as he cannot lawfully accept, in his ward's behalf, of a transfer upon a person that is *poor*; because the interest of the orphan is what must be consulted, (whence the power of a guardian is restricted to what may conduce to the *interest* of his ward;) and as the acceptance of a transfer upon a person that is *poor* is destructive of the orphan's interest, it is therefore illegal.

The acts of
a manager
are—such as
he is em-
powered to
perform by
the contract;

THE acts of a *Mozârib*, or *manager*, are of three kinds. I. Such as he is competent to perform in virtue of the absolute contract of *Mozâribat*; including all deeds partaking of the nature of *Mozâribat*, or of its dependences; such, for example, as agency for purchase or sale,

sale, because of the necessity for those acts; and also *pawn*, as this is in the nature of a discharge or satisfaction; and likewise *deposit*, *bire*, entrusting in the manner of *Bazát*, and also travelling with the stock, as before mentioned.—II. Such deeds as he is not competent to perform in virtue of the absolute contract, but in virtue of a general power granted him by the proprietor, to act agreeably to his own judgment and discretion; including all such deeds as may have a probable connexion with a contract of *Mozáribat*; and which are accordingly held to be connected with it, when there exists any argument for their being so;—such as the giving of the stock to another in the way either of *Mozáribat*, or of partnership, or the mixing of it with the manager's own property, or with that of another;—to which acts a manager is not competent, merely in virtue of the absolute contract, except where something argues a connexion between the act and the contract; because it is presumed that the proprietor of the stock intends that the manager alone should be his partner, and not any other person; and these acts are not in the nature of *traffic*, (as traffic does not depend upon such acts,) and consequently are not comprehended in the absolute contract: yet, as they are all instruments of an increase of profit, and are therefore admissible in a contract of *Mozáribat*, they are accordingly included in the contract, where any argument exists of their so being; and the power granted to the manager by the proprietor “to act according to his own discretion,” clearly argues thus much.—III. Such deeds as the manager is not competent to perform, either in virtue of the absolute contract, or from the discretionary power granted him by the proprietor, being neither in the nature of *traffic*, nor having any probable connexion with the contract, but such as he may perform in case of an express power from the proprietor of the stock. These are termed *Istidánit**; such as where a manager purchases something in exchange for *dirms* and *deenars*, after having laid out the whole capital in the purchase of goods and effects,

or in virtue of a general and discretionary power vested in him by the proprietor;

or such as he is not empowered to perform in either way.

* Anglicé.—*Desiring to borrow*.—In its common acceptation, it signifies *contracting debt*, on behalf either of one's self or of another.

in which case the transaction relates entirely to the manager, and he is entitled to all the profit as well as subject to the loss or debts that may result from it: or, where a manager lays out, in purchasing goods, more than the amount of the capital, in which case what is tantamount to the stock is considered as belonging to the *Mozāribat*; and the profit, loss, or debts resulting from the excess, relate solely to the manager: or, where the stock consists of *dirms* and *deenars*, and the manager purchases something in exchange for articles of weight, measurement of capacity, or of tale; for, in that case, as the manager makes the purchase with something else than the stock, it is considered as an *Ifidānit*, and operates entirely with respect to the manager; that is to say, the profit, loss, and debts arising from it, relate entirely to him, and not to the proprietor of the stock; the reason of which is, that *Ifidānit* is a transaction with respect to other property than the capital; and as the agency is confined to the capital, the manager is of course not competent to such transaction.—Moreover, the property, in this case, exceeds the amount of that which was the subject of the contract, to which the proprietor has not assented; and although, in such excess of property, there be advantage, yet it is not free from the risk of loss, and of its producing debts.—If, however, the stockholder give his assent to the *Ifidānit*, then the thing which the manager may have purchased is participated between him and the stockholder, in the manner of a *Sbirkat Wadjoob*, or partnership upon personal credit*, which signifies, where two persons are partners without either stock or labour, and purchase something upon credit, to be paid for at a future period, and sell it again. Of the third species of acts in *Mozāribat* is also the taking of *Sifatja*, which is a species of *Ifidānit*, and the giving of *Sifatja*, which resembles a loan.—*Sifatja* means the delivery of property to another by way of loan, and not by way of trust, in order that that other may deliver it to some friend of his; and the object of it is to avoid the dangers of the

* See Vol. II. p. 324.

road.—In the same manner also emancipation, either in exchange for property, or without property in exchange, and contracts of *Kitábat*, are of the third species of acts in *Mozáribat*, as not being in the nature of *traffic*:—and the same of *gifts*, *loans*, and *charities*, which are mere gratuitous acts.

It is not permitted to a manager, according to *Haneefa* and *Mohammed*, to join in marriage male and female slaves which are of the stock of the contract.—It is recorded as an opinion of *Abou Yoosaf*, that he may contract in marriage a *female* but not a *male* slave, because the bestowing of a female slave in marriage is in the nature of acquisition, since her *dower* is obtained from it, and her maintenance annulled.—The argument of *Haneefa* and *Mohammed* is, that the bestowing of a female slave in marriage is not in the nature of *traffic*, and a contract of *Mozáribat* includes only agency in such things as relate to *traffic*, whence this is the same as the making a slave *Mokátib*, or the emancipating him in exchange for property; for in both these cases there is an acquisition of property; but as neither of them relates to *traffic*, they are not included in a contract of *Mozáribat*; and so also in the case in question.

A manager is not allowed to contract male and female slaves (forming a part of the stock) in marriage to each other.

If the manager deliver any part of the *Mozáribat* stock to the proprietor, as a *Bazát*, and he make purchase and sale with it, it continues to belong to the *Mozáribat* stock, in the same manner as before. *Ziffer* says that the *Mozáribat* is annulled; because the proprietor, in this instance, acts with what is *his own*, and he is incapable of being the manager's agent in work which he performs with his own property: the proprietor, therefore, on this occasion, may be said to have *taken back* so much of the *Mozáribat* stock; whence it is that a contract of *Mozáribat* is not valid where the labour of the proprietor is stipulated for at the time of making the contract.—The argument of our doctors is, that after the *Mozáribat* stock has been duly delivered to the manager, and taken possession of by him, and the manager has thus

Any part of the stock delivered by the manager to the proprietor in the manner of a *Bazát*, still continues to appertain to the *Mozáribat* stock.

thus acquired a right of transacting with it, the proprietor is fully capable of acting as an agent on behalf of the manager, in transacting with the stock; and as making it over in the way of *Bazât* amounts to a commission of agency, it follows that (in this view) the proprietor cannot be considered merely as *receiving back* his stock. It is otherwise where the proprietor's uniting in the management is made a condition of the contract, originally, as this is repugnant to the delivery of the stock to him for the purpose of management, and also to his taking possession of it. It is also otherwise where the manager makes over the stock to the proprietor in the way of *Mozâribat*, which is not lawful; because a contract of *Mozâribat* is a contract of partnership in the profit derived from the stock of the proprietor and the labour of the manager; and, in the case in question, none of the stock appertains to the manager; whence, if this were allowed, it would follow that both the stock and the labour proceed from one party; and this defeats the use of the contract.

OBJECTION.—Making it over as *Bazât* also defeats the use of a contract of *Bazât*, as a contract of *Bazât* signifies the stock being found by *one* party, and the labour by *another*; and if, in the case in question, this were admitted, it would follow that both the *stock* and the *labour* proceed from one party.

REPLY.—*Bazât* signifies simply, *agency*; and as a manager is endowed with a power of transaction, it follows that his delivering the stock, as *Bazât*, is a commission of agency, proceeding from him, in regard to a thing concerning which he is empowered.

—It is to be observed that, the secondary *Mozâribat* not being valid, the proprietor's management with the property still remains subject to the orders of the manager; and hence the primary *Mozâribat* is not annulled.

No part of,
the mana-
ger's expence
to be de-

If the manager transact his business in his own city, his maintenance does not fall upon the stock. If, however, he *travel* with it, his provisions and clothing are to be furnished out of the stock;—and
the

the same, also, of his conveyance, (that is to say, it is also lawful for him to purchase or hire a quadruped to carry him from place to place, at the expence of the stock,) for this reason, that a subsistence is due to him on account of his confinement, in the same manner as the subsistence of a *Kázee*, who, as being in a state of *confinement*, in the exercise of his public duties, is entitled to a recompence from the public treasury,—or like a wife, who is entitled to subsistence from her husband, because of her being in his custody:—for the manager, so long as he remains in his own city, resides there merely as it is his home, and not on account of the *Mozáribat* in particular: but upon his *travelling* he becomes confined on behalf of the *Mozáribat*, and is therefore entitled to subsistence out of the *Mozáribat* stock.—It is otherwise with an *hireling*, who is not entitled to any subsistence although he travel, because he is already entitled to a compensation, namely, his *wages*, which are certain, and for which, if he were subsisted out of the stock entrusted to his management, there would be no absolute necessity:—whereas a manager, on the contrary, is not entitled to any thing but his share of the profit; but profit is uncertain; (in other words, it is possible that a profit may be gained; and it is also possible that no profit may be gained;) if, therefore, the manager were obliged to furnish his own maintenance, he might be a *loser*.—It is otherwise, also, in a case of invalid *Mozáribat*, because the manager, in such a case, is entitled to *wages*: and it is likewise different from a case of *Bazát*, since a person who undertakes the management of a *Bazát* gives his labour gratuitously, and is therefore not entitled to a subsistence.—It is to be observed that if, on the manager's return into his own city, there remain any victuals or clothing in his hands, he must return them into the *Mozáribat* stock, since his right to those articles no longer remains, because of his return into his own city.

If a manager go forth from his place of residence to a distance short of what constitutes a *journey*, his maintenance does not fall upon the

frayed unless
he travel

to a distance
beyond a
day's journey

from the usual
place of his
abode.

the stock; for, where he goes only to such a distance as that, if he set off in the morning, he may by the evening return and pass the night at home with his family, he is as any other merchant of the place.—If, however, he go to such a distance as not to be able to return home the same evening, his maintenance is due from the stock, since he is absent upon the business of the *Mozâribat*.—*Nifka*, or subsistence, signifies such things as are expended in the supply of our daily wants, such as meat, drink, and clothing; and among these things, also, is the hire of a washerman, and other servants, and the maintenance of a quadruped for riding; and oil for anointing, where that is commonly used, as in *Mecra*.—It behoves the manager not to expend any of those articles of subsistence in a degree beyond what is customary; inasmuch that, if he exceed in his expences what is customary among merchants, he is responsible for the excess. *Medicine* used by a manager, however, must be furnished at his own cost, according to the *Zâbir Rawâyet*. It is recorded from *Haneefa*, that medicine is included in the subsistence; because this is taken for the preservation of health; and as it is impossible that he should engage in commercial transactions unless he be in health, it consequently partakes of the nature of subsistence.—The reason for what is said in the *Zâbir Rawâyet* upon this point is, that the necessity of *subsistence* is known and certain. *Medicine*, on the contrary, is necessary only in case of supervenient sickness; and as sickness sometimes occurs, and sometimes does not occur, it follows that medicine is no part of maintenance; and hence it is that, although a wife's maintenance must be furnished by her husband, yet she finds herself in medicine at her own expence.

and it is de-
frayed out of
the *profit*, not
out of the
stock.

WHEN a profit is gained, the proprietor first takes the whole *capital stock*, and then the remainder is divided between both the parties according to stipulation:—the subsistence of the manager, therefore, is taken from the *profit*, and not from the *capital*, although the manager should have expended out of the capital for his subsistence.

IF

If the manager sell goods and effects in the way of traffic, he must charge the expence attending these goods and effects (such as *portage* and *brokerage*) to the account of the capital stock:—but he is not to charge the capital with what he expends upon himself for subsistence; for this reason, that it is the custom of merchants to charge the *former* to the account of their capital, but not the *latter*; and also, because the former enhances the value of the goods, but not the latter.

All expences incident to the sale of stock must be defrayed out of that.

If a manager have in his hands one thousand *dirms*, and lay them all out in the purchase of cloth, and expend one hundred *dirms* of his own property in bleaching and *portage*, and the proprietor of the stock had desired him to act according to his own discretion,—in this case the manager is accounted to have acted voluntarily, because as he hereby subjects the proprietor of the stock to a debt, it follows that the proprietor's instruction to him to act according to his own discretion, does not include a transaction of this nature, as was formerly explained.—If, on the other hand, the manager, in the case in question, expend one hundred *dirms* of his own in dyeing the cloth *red*, he is a partner in the excess occasioned by the dyeing, because the colour is a substantial property existing in the cloth: hence, when the cloth is sold, the manager receives his share in respect to the *colour*; and also his proportion of the cloth, as undyed, according to the contract of *Mozáribat*: contrary to the case of *bleaching* and *portage*, as that does not occasion any additional substantial property to exist in the cloth;—whence it is that if an usurper bleach cloth which he has seized, without the consent of the owner, and the value be enhanced by the bleaching, yet the proprietor is at liberty to take back the cloth without making him any compensation;—whereas, if the usurper dye the cloth *red* or *yellow*, the owner is not at liberty to take it back without making a compensation, but has it at his option either to take the cloth, allowing the usurper the difference occasioned in the value by dyeing,—or to take an indemnification for the value of the cloth as

All expences upon articles purchased, which do not substantially add to the article, are voluntary on the part of the manager.

the stock must be
the best of the
the stock must be
the best of the
the stock must be
the best of the

it stood at the time of dying, and suffer it to remain with the usurper. It is to be observed that, on the manager becoming a *partner* in the cloth in consequence of the dying, he is not responsible for any thing, because the proprietor's direction to him, "to act according to his own discretion," comprehends a liberty to the manager to mix his own property with the *Mozáribat* stock; as was before mentioned.

All expenses
upon articles
purchased
which do not
substantially
add to the
value of the
stock.

Case of loss
of the stock
after a profit
having been
acquired and
a debt incur-
red upon it.

SECTION.

If a manager, having one thousand *dirms* in his hands, under an agreement of *half the profit*, purchase *linen* (for instance) to the amount of one thousand *dirms*, and sell the same for two thousand *dirms*, and again purchase a slave for two thousand,—and should not pay the price of either article, (that is, of the *cloth*, or of the *slave*,) until such time as these two thousand *dirms* perish in his hands, in this case the proprietor of the stock must make satisfaction to the amount of fifteen hundred *dirms*, and the manager to the amount of five hundred; and *one fourth* of the slave appertains to the manager, and *three fourths* to the *Mozáribat* stock.—The compiler of the *Hedaya* remarks that what is here said is the necessary result of the case; for the *whole* of the price is incumbent upon the manager, (since *he* is the contracting party in the purchase;) but yet he is entitled to call upon the proprietor of the stock for fifteen hundred *dirms*; the proprietor, therefore, is responsible for fifteen hundred, (at the *end* of the transaction, not at the *beginning* of it,) for this reason, that when the *Mozáribat* stock * was converted into cash, a profit appeared upon it, of which five hundred *dirms* go to the manager: consequently, upon his

* Namely, the linen.

purchasing the slave for *two thousand*, he purchases one fourth of the slave on *his own* account, and three fourths on account of the *Mozâribat*, (according to the division of the two thousand;) and upon the two thousand perishing, the price of the slave is due from him, as it is he who made the bargain for him; but he is entitled to call upon the proprietor for *three fourths* of the price, because he acts as his agent in the purchase thereof. The manager's share, which is *one fourth*, is detached from the *Mozâribat* stock, for that is secured; (that is to say, it is incumbent upon the manager to give one fourth of the price to the sellers [of the slave and cloth] after the destruction of the *stock*;) but the *Mozâribat* stock is a *trust*; and a property *secured* is inconsistent with a property *in trust*: it is therefore indispensable that the manager's share be so detached;—and three fourths of the slave continue in the *Mozâribat* stock, for in that there is nothing inconsistent with *Mozâribat*:—consequently the capital then becomes *two thousand five hundred*, because the proprietor of the stock has given to the manager, in the *first* instance, one thousand *dirms*, and fifteen hundred in the *second* instance.—The slave, however, cannot be sold, so as to make any *profit* of him, for less than *two thousand*, because he has been bought for *two thousand*.—With respect to what is above said, that “the *fourth* of the slave is detached, and the other three “fourths continue in the *Mozâribat* stock,”—the use of this appears where the manager sells the slave (suppose) for four thousand *dirms*,—for in this case the *capital*, which is two thousand five hundred *dirms*, must be deducted from that proportion which appertains to the *Mozâribat*, which is three thousand *dirms*,—and consequently a profit of five hundred remains to be shared between the parties.

If the manager be possessed of one thousand *dirms*, and the proprietor of the stock purchase a slave for five hundred *dirms*, and sell him to the manager in return for the capital stock, (namely, one thousand *dirms*,) he [the manager] is considered as selling him [the slave] by a

Cases of sale
by the em-
ployer to the
manager,

Morábihat sale, at the rate of five hundred *dirms**; for such sale is lawful, because of the difference of views in it,—since the view of the proprietor of the stock is to obtain one thousand *dirms*, at the same time securing the continuance of the *Mozáribat* contract; and the view of the manager is to obtain possession of the slave.—The sale, therefore, is lawful, that the ends of both parties may be answered, although it be a sale of property belonging to the party for property belonging to the party.—There is, however, in this sale, a *semblance* of illegality; since the slave does not, in fact, pass out of the property of the proprietor of the stock; and a *semblance* is connected with a *reality* in any matter concerning which caution is requisite.—Now caution is requisite in a *Morábihat* sale, since the points on which it turns are *confidence*, and a caution against the semblance of deceit: and accordingly, in the *Morábihat* sale, regard is had to the *lowest* price, which is five hundred *dirms*.

or by the
manager to
the employer.

If a manager, possessed of stock to the amount of one thousand *dirms*, purchase a slave for those thousand, and sell him to his employer for twelve hundred, he is considered as selling him, by a *Morábihat* sale, for eleven hundred, since the contract in question is considered, with respect to one half of the profit, (which is the proprietor's share) as non-existent:—as was formerly explained in treating of *Morábihat* sales.

Case of a slave
purchased by
the manager,
and who is
afterwards
guilty of ho-
micide.

If a manager be possessed of one thousand *dirms*, under a condition of half the profit, and with these thousand purchase a slave valued at two thousand, and the slave accidentally slay a person, three fourths of the atonement rest upon the proprietor of the stock, and one fourth upon the manager;—because, as the atonement is an expence attendant upon the right of property, the proportions of it are, consequently,

* See sales of profit.

according

according to the proportions of right of property. Now the property is here held between the parties in four lots, three of which appertain to the proprietor of the stock, and one to the manager; because, upon the capital being resolved into one specific article, the profit (namely, one thousand *dirms*) becomes evident; and that is between the two in equal shares; and one thousand (the original capital) appertains to the proprietor of the stock, as the value of the slave is *two* thousand. Upon each party paying his proportion of the atonement, the slave becomes excluded from the *Mozâribat* stock:—the manager's share in him; because, in the present instance, his responsibility with respect to that share operates upon him, and hence that share is no longer as a *deposit* with him; and *Mozâribat* stock is a deposit, as was formerly explained:—and the proprietor's share, because, upon the magistrate decreeing the atonement to be divided between both, the slave also becomes divided between them; and a contract of *Mozâribat* is dissolved by a participation in the stock.—It is otherwise in the case exemplified in the beginning of this section, (where two thousand *dirms* perish in the manager's hands,) for there the three fourths which form the share of the proprietor of the stock do not become excluded from the *Mozâribat* contract.—The difference between that case and the case now under consideration, exists in three shapes. I. In the former case the responsibility of *traffic* only is incumbent; and responsibility of traffic is not repugnant to *Mozâribat*, since *Mozâribat* itself is a branch of traffic;—whereas, in the case in question, responsibility for *offence* is incumbent; and responsibility for offence is not a branch of traffic.—II. In the former case, the whole price is incumbent upon the manager, although he have a right to revert upon the proprietor of the stock;—in that instance, therefore, there is no necessity for division.—III. The slave, in the instance of offence, escapes, as it were, from the property of both parties, in consequence of his offence, and their paying an atonement for him is, as it were, a purchase of him *de nova*.—He, therefore, no longer appertains to the *Mozâribat*.

záríbat stock, but is held between the parties in four lots, performing service to the manager one day, and to the stock-proprietor three days, alternately:—contrary to the former case.

The manager bargaining for an article, and then losing the stock, must have recourse to his employer for another stock, to enable him to fulfil his engagement.

If a manager be possessed of a thousand *dirms*, and therewith purchase a slave, but neglect paying the price to the seller, and the thousand *dirms* perish in his hands, the proprietor of the stock must, in this case, make over another thousand to the manager, and the *Mozáríbat* stock is then two thousand *dirms*.—The reason of this is, that as the stock is merely a *deposit* with the manager, he therefore cannot be considered as having duly received the price in virtue of his seizure [of the one thousand *dirms*,] since a receipt in virtue of seizure is not established unless it involve responsibility.—Now as a due receipt of the price, by the manager, is not established, it follows that he is entitled, even *repeatedly*, to take the price from the stock-proprietor; that is to say, if he take the price from the proprietor, and it be again lost in his hand, he may again take the price from him; and so on, repeatedly, until the seller's demand be satisfied;—and the whole of what the proprietor thus makes over to the manager becomes stock.—It is otherwise in the case of an agent commissioned to purchase a specific slave for one thousand specific *dirms*,—where the constituent delivers the price to the agent *before* the purchase, and they are lost in his hands *after* the purchase; for in this case the agent cannot take the price from his constituent more than once, since it is possible to consider him as having already made a due receipt of the price from his constituent; for agency is not repugnant to responsibility, but is rather involved with it;—as where, for instance, an usurper is commissioned by the proprietor to sell the thing he has usurped.—It is to be observed that, in the case of agency, as here adduced, the agent reverts to his constituent only *once*.—If, however, the agent were first to make the purchase, and *then* to receive the price from his constituent, he cannot afterwards revert

to him at all; because, as the agent becomes endowed with a right to call upon his constituent on the instant of the purchase, it follows that his seizure of the price, after that was due, is a complete receipt on his part:—he is therefore considered as having duly received the price, in virtue of his seizure of it after the purchase:—on the contrary, what the constituent makes over to the agent *before* the purchase is merely a *deposit* in his hands; and *after* the purchase it still remains a *deposit* with him, since, in this instance, no cause of responsibility appears even *after* the purchase.—The agent, therefore, in this case, is not considered as having duly received the price; and consequently, upon that being lost in his hands, he may take it again from the purchaser:—but if, again, it be lost in his hands, he cannot again revert upon the purchaser, since here a due receipt has been established, as before explained.

CHAP. V.

Of Disputes between the Proprietor of the Stock, and the Manager.

If the manager have two thousand *dirms* in his hands, and say to the stock-proprietor, “you entrusted me with one thousand, and one thousand has accrued as profit,” and the proprietor reply, “I entrusted you with two thousand,”—the assertion of the *manager* is to be

In disputes respecting the acquisition of profit upon the existing stock, the as-

assertion of the
manager is to
be credited:

but in dis-
putes con-
cerning the
proportions of
profit, that of
the proprietor;

as also, in
disputes con-
cerning the
nature of the
agreement
under which
the stock was
entrusted to
the manager.

be credited.—*Haneefa* was at first of opinion that the assertion of the proprietor should be regarded; and such is the doctrine of *Ziffer*;—because the manager here appears as a plaintiff, claiming a partnership in the profit,—and the proprietor as a defendant, denying his claim; and the assertion of the defendant is to be credited.—*Haneefa*, however, afterwards retracted this opinion, and admitted that the assertion of the manager must be credited; because the dispute here turns upon the amount received; and concerning that the assertion of the receiver must be credited, whether he be merely a trustee, or otherwise, since he best knows what he has received.—If the parties dispute, not only concerning the amount of the stock, but also concerning the proportion of the profit,—the manager affirming it to be between them in equal shares, and the proprietor asserting it to be in three lots, two for himself and one for the manager, the assertion of the proprietor is to be credited; because the manager here claims profit in virtue of a condition, which condition operates to the prejudice of the proprietor: his assertion, therefore, is to be credited.—But if either of the two produce evidence, his declaration must be admitted, as evidence is positive proof.

If a person, having one thousand *dirms* in his hand, say “such a person entrusted me with these in the way of *Mozâribat*, under a condition of half the profit,”—and the person alluded to say “I gave him the one thousand *dirms* as *Bazât*,” the declaration of the proprietor is to be credited; because the manager is plaintiff in this instance, since he either claims from the proprietor a recompence for his service, or alleges a condition to his prejudice, or a partnership in the profit,—all of which the proprietor denies.

If a person, having in his hands one thousand *dirms*, the property of another, assert that “those thousand had been lent to him

“ him by that other,” and the other assert that “ he entrusted him “ with them in the manner of *Bazât*, *deposit*, or *Mozâribat*,” the assertion of the *proprietor* is to be credited on the one hand, or evidence adduced by the person in question on the other;—because he asserts his having obtained possession of the sum in dispute, by a *loan*; which the proprietor denies.

If the proprietor of the stock advance an allegation, against the manager, of restriction to one mode of traffic, affirming, for instance, that “ he had directed him to trade in *cloth*, and in no other article,”—the assertion of the *manager*, upon oath, must be credited,—for, as *universality* is the original thing in a contract of *Mozâribat*, and restriction cannot be imposed in it but by particular stipulation, it follows that the assertion of the party who rests upon the *original* thing must be credited. It is otherwise in agency, for in that *restriction* is the original thing.

If the proprietor assert a restriction, the denial of the *manager* is credited:

If the proprietor allege a restriction to *one* particular mode of traffic, and the manager allege a restriction to *another* particular mode, the assertion of the proprietor must be credited; for here both parties agree in the contract being restricted, and the proprietor's admission, in this particular, is pleaded against him.—His assertion, therefore, is to be credited on the one hand; or evidence adduced by the manager, on the other;—for the manager stands in need of evidence to disprove his responsibility; but the proprietor does not stand in need of evidence.

but if each allege a different restriction, the allegation of the *proprietor* is credited.

If the proprietor allege a restriction in point of time, and produce evidence thereto, and the manager allege a restriction to *another* time, and produce evidence thereto,—the proprietor, on his part, asserting that “ he entrusted him [the manager] with one “ thousand *dirms*, in the manner of *Mozâribat*, for the purpose of “ purchasing wheat in the month of *Ramzân*,”—(producing evi-

In disputes concerning restriction to time, the evidence which proves the latest date is preferred.

dence in support of his allegation,)—and the manager, that “ he
“ [the proprietor] gave him one thousand *dirms* for the purpose of
“ purchasing wheat in the month of *Shawâl*,” (producing evidence
in support of his allegation,)—the evidence which tends to prove
the latest date must be preferred; because the condition *last* stipulated
annuls the condition *first* stipulated.

H E D A R A.

B O O K XXVIII.

Of WIDDA, or DEPOSITS.

WIDDA, in the language of the LAW, signifies a person empowering another to keep his property.—The proprietor of the thing is stiled *Modee*, or the *depositor*;—the person so empowered the *Modá*, or *trustee*;—and the property so left with another, for the purpose of keeping it, is stiled *Widdeeyat*, because *Widda* literally means *to leave*, and the thing in question is *left* with the *Modá* or trustee.

Definition of
the terms used
in deposit.

A trustee is not responsible for a deposit unless he transgress with respect to it.

A DEPOSIT remains in the hands of the person who receives charge of it, as a trust,—that is to say, he is not answerable for it. If, therefore, a deposit be lost or destroyed in the trustee's hands, without any transgression on his part, he is not in that case responsible for it; because the prophet has said "*an honest trustee is not responsible*;"—and also, because there is a necessity, amongst mankind, for deposits; and this necessity could not be answered in case of making trustees responsible, as no one would then accept the trust.

He may keep it himself, or commit the care of it to any of his family;

but if he give charge of it to a stranger he becomes responsible;

A TRUSTEE may either keep the deposit himself, or commit it for that purpose to some one of his family, such as his wife, his son, his mother, or his father; because it is evident that a trustee does not engage to keep the property of another with more care than he does his own; and he sometimes keeps his own himself, and sometimes commits it to one of his family. Besides, there exists an absolute necessity for committing the trust to his family, since it is neither possible for him to remain always in the house, nor, when he goes out, to carry the deposit with him.—For all those reasons, therefore, the consent of the proprietor is understood to extend to the trustee's committing the deposit to the care of his family.—But if the trustee should commit the deposit to the charge of any other than a member of his family, (as if he were either to hire some person *out* of his family, for the purpose of keeping it,—or to give it in deposit to some one out of his family,) he is then responsible, in as much as there is a difference between the care of different people, and it was *his own* care, and not that of *another*, to which the proprietor assented. Besides, a thing does not involve its similar; and hence a trustee is not empowered to constitute another the trustee of the same thing; in the same manner as an agent is not permitted to constitute another agent. (By the term *family*, in this place, is to be understood all such as live with the trustee, or whose maintenance is incumbent upon him, or his upon them, as a *wife* or adult *son*.)

If a trustee lodge the deposit in a place of custody * belonging to another, he becomes responsible for it; because the lodging it in *another's* place of custody is, in effect, depositing it with that other.—It is otherwise, however, if he *hire* the said place; for in that instance his lodging it there is considered in the same light with his keeping it himself, and therefore does not induce responsibility.

and so also, if he lodge it in a place of custody belonging to another.

If the house of a trustee take fire, and he deliver the deposit to his neighbour,—or if, being in a boat on the point of sinking, he throw the deposit into another boat,—and it in either case be lost, he is not responsible, since he acted only for the preservation of it, and consequently according to the consent of the proprietor. But the assertion of the trustee, in such cases, is not to be credited unless supported by witnesses, since, upon the establishment of a cause of responsibility, he pleads the existence of a necessity, which invalidates the responsibility, and the case is therefore the same as if he were to plead that the proprietor had empowered him to consign the deposit to another.

He is not made responsible by putting it out of his own possession with a view to the immediate preservation of it.

If the proprietor of the deposit demand it from the trustee, and he neglect delivering it to him, being at the same time capable of such delivery, he becomes in that case responsible for it, since his neglecting or refusing to deliver it, under a capacity to do so, is a transgression.—The ground of this is, that the demand of the proprietor clearly indicates his dissent from the trustee's retaining possession any longer, and is therefore a dismissal of him from the trust.—Hence the trustee is responsible, because of his retaining possession after such dissent.

He becomes responsible on neglecting to deliver it on demand.

If the trustee mix the deposit with his own property, in such a manner that a separation becomes difficult, he must in that case make

If he mix it inseparably with his own

* Arab. *Makân Mobirrez*; meaning a chest, or other place of security. (See *Hinz.*)

property, he
must make
the proprietor
a compensa-
tion.

an adequate compensation, and the proprietor (according to *Haneefa*) has not the option of sharing the mixed property, whether the mixture be of a *homogeneous* nature, (such as milk with milk, wheat with wheat, or white *dirms* with white *dirms*,) or of a *heterogeneous* nature, (such as oil of sesamé with oil of olives, or wheat with barley.) The two disciples allege that where the mixture is of homogeneous articles not of a *liquid* nature, (such as white *dirms* with white *dirms*, or *wheat* with *wheat*,) the proprietor of the deposit has the option either of becoming a sharer with the trustee, or of taking a compensation for the value; because although it be impossible, in such a case, for the proprietor to receive his right with respect to *appearance*, still it is possible for him to receive it with respect to *reality*, (that is, in *effect*,) by making a division, since, in all articles of weight, or measurement of capacity, a delivery by *division* is equivalent to a delivery of the actual article, according to all authorities.—Such, therefore, being the case, it appears that *mixture*, in the instance in question, is a destruction in one respect, but not a destruction in another respect; and consequently, that the proprietor of the article placed in deposit has the option either of taking a compensation on the principle of the mixture being a *destruction*, or of becoming a sharer (if he please) on the principle of its *not* being a destruction.—The argument of *Haneefa* is that mixture is in every respect a destruction, because of its being an action which occasions an impossibility of returning the thing to the proprietor in its original substance.—In regard to what the two disciples advance, that “it is possible for the proprietor to receive his “right with respect to *reality*, by means of a division,” it is answered that the proprietor cannot attain his *actual right* by means of division. Besides, division has been instituted from necessity, merely as a mode of advantage in cases of partnership. Division, therefore, is merely an *effect* of partnership, and is incapable of being a *cause* of it, for otherwise the principal would become secondary, and the secondary principal.—The result of this disagreement is that if the proprietor should exempt the trustee, where he makes the mixture, by saying
to

to him "I exempt you from the compensation due by you on account of the mixture," in that case, according to *Haneefa*, his right becomes entirely cancelled, since (agreeably to his tenets) the proprietor's right is limited to the compensation, which he expressly foregoes;—whereas, according to the two disciples, the proprietor's right of option to a compensation ceases in consequence of such exemption, and resolves itself into a share in the mixed property; because although, by the exemption, his *right of option* be destroyed, still his *actual property* is not destroyed.—It is to be observed that the mixture of one liquid with a different liquid (such as of oil of *Sesamé* with oil of *olives*) destroys the right of the proprietor to a participation in the mixed property, and fixes and determines it to a compensation, according to all our doctors, as such a mixture is a destruction with respect both to appearance and reality, since a division is in this instance impracticable, because of the difference of species.—Of the same class, according to the *Rawdyet Saheeh*, are all cases of an admixture of different articles, *not* liquids, where the separation is difficult, as in the mixture of *wheat* with *barley*.—In cases where the separation requires a process, or is attended with some difficulty, (such as if *dirms* should be melted and incorporated with others,) the depositor's right to the substance ceases, and he is entitled to a compensation, according to *Haneefa*, as before stated. *Abou Yoosaf* holds that in this case the smaller is subordinate to the greater, (for, according to his tenets, *superiority* must be regarded,) and that, therefore, the person who possessed the largest share of the property becomes proprietor of the whole, and liable to compensate to the other for the value of his quantum.—*Mohammed*, on the other hand, maintains that the proprietor of the deposit becomes a participator with the other in either case, because, according to his tenets, species cannot acquire a superiority over the same species, as has been already explained in treating of fosterage.

If a deposit be mixed with the property of the trustee, not by any act of the latter, but by accident, (as if a bag containing the deposit

If the mixture be occasioned by accident, the

proprietor becomes a proportionate sharer in the whole.

posit, and another containing property of the trustee, should both be torn, and the contents mingled together,) in that case the trustee becomes a sharer in the property with the depositor, and is not responsible for a compensation, since he did not commit any act inducing responsibility.—They therefore become partners in the whole, according to all our doctors.

If the trustee expend a part, and supply the deficiency, by mixture, from his own property, he is responsible for the whole.

If a trustee expend part of the deposit, and then produce a similar to what he had expended, and mix it with the remaining part, in such a manner that a separation is difficult, he is, in that case, responsible for the *whole* of the deposit; because the part expended is a debt due by him, which he cannot otherwise discharge than in the presence of the owner.—When, therefore, he mixes his own property with the remainder of the deposit, he in fact destroys that remainder; as was before explained.

In cases of transgression with respect to the deposit, the trustee is responsible so long as the transgression continues.

If a trustee transgresses with respect to the deposit, by converting it to his own use, (as if, being a quadruped, he should ride upon it, —or, being a gown, he should wear it,—or, being a slave, he should use his services,)—or by committing it to the care of a stranger, and he afterwards refrain from the use of it, or receive it back from the stranger, his responsibility thereupon ceases. *Shaf'ei* maintains that he does not become exempted from responsibility; because the contract of deposit ceases and determines immediately on the existence of responsibility, since *responsibility* and *deposit* are irreconcilable:—the trustee, therefore, in such case, cannot be exempted until he make actual restitution to the proprietor. The argument of our doctors is, that the order of the depositor to preserve the property continued to operate, as it was absolute, and not restricted to any particular time; it being understood, in this case, that the proprietor had generally desired him to preserve the property, without restricting such desire to any particular time.—As, therefore, the order is still in force, it follows that the trustee, after abstaining from the transgression, becomes again trustee, because the object of the contract was preservation

preservation.—The contract, moreover, was suspended in its effect merely from the necessity of establishing a breach of it: when, therefore, the breach is removed, the contract becomes revived in its effect; in the same manner as where a person hires another to guard his property for a month, and the person so hired remits his guard for part of the month, in which case he is entitled to wages in proportion to the number of days he did watch.—In answer to *Shaf'ei's* assertion, that “the trustee cannot be exempted from responsibility until he “make actual restitution to the proprietor,” it is to be observed that, as the original order still continues in force, and the trustee ceases from his transgression, a recovery of the deposit is obtained into the possession of the trustee, who is the substitute or confidant of the proprietor; and as this recovery is equivalent to a restitution of it to the proprietor himself, he [the trustee] is consequently not responsible for it on the ground of destruction.

If the proprietor of the deposit demand it of the trustee, and the trustee deny the deposit, and it be afterwards lost, the trustee is in that case responsible; because, as the depositor, in making the demand, dismisses the trustee from his charge, it follows that the trustee, in retaining the deposit after such demand, is an usurper, and is consequently responsible.—If, also, after the denial, the trustee should acknowledge the deposit, still he does not thereby become exempted from responsibility, because the contract had been previously done away, in as much as the demand of restitution by the depositor was a dissolution on his part, and the denial of the deposit was a dissolution on the part of the trustee; in the same manner as the denial of agency by the agent, or of sale either by the buyer or seller, is a dissolution on their part.—Now when a dissolution takes place on both sides, the contract to which it relates is done away, and cannot afterwards be revived, unless by a new formation, which does not appear in the case in question.—In this case, therefore, a recovery into the possession of the proprietor's substitute cannot be understood.—It is other-

If the trustee deny the deposit, upon demand, he is responsible in case of the loss of it:

wife where the trustee deviates from his instructions by transgressing upon the property, and afterwards ceases from such deviation, and conforms to his orders, for in this case a recovery appears into the the possession of the proprietor's substitute, as was before explained.

but not if the denial be made to a stranger.

If the trustee deny the deposit to some *other* than the proprietor, he is not responsible, according to *Abou Yoosaf*, (contrary to the opinion of *Ziffer*,) because denial to any other than the proprietor may be for the sake of preservation. The trustee, moreover, is not competent to his own dismissal, unless in the presence of the depositor, or unless the depositor claim his property from him. The order for keeping the property, therefore, still continues in force:—contrary to where the denial is made to the *depositor*.

A trustee is at liberty to carry the deposit with him upon a journey,

A TRUSTEE is at liberty, according to *Haneefa*, to carry the deposit with him when he travels, although carriage and other expences be thereby incurred.—The two disciples maintain that this is not permitted to him where carriage or other expence is incurred. *Shafëi*, on the other hand, maintains that it is not allowable in either case, because he considers an order to *keep* the article in the common acceptance of *keeping*, namely, keeping in *cities*; in the same manner as where a person hires another for the preservation of his goods for a stated time, in which case the person hired is not at liberty to travel with the goods,—or, if he should do so, becomes responsible for them. The argument of *Haneefa* is, that the proprietor's commission for preservation is absolute and unconfined; and that a *plain* is a place of preservation, provided the road be secured; on which principle it is permitted to a father or guardian to travel with the property of their ward. The reasoning of the two disciples is that, in case of travelling, where carriage for the deposit is necessary, the expence of it must fall on the depositor; and as it is probable he may not assent to this, his commission for keeping the article must, in such a case, be considered

as limited to a city.—The answer to this is that the circumstance of the expence of removal falling upon the proprietor is of no moment, as it may be a consequence of an attention to the preservation of his property, and the fulfilment of his commission.—The answer to *Shafëi* is that although all articles chiefly abound in *cities*, still the *keeping* or *preserving* of them is not particularly confined to *cities*, but extends alike to cities and to plains; since the inhabitants of plains must necessarily *keep* their property in plains.—Besides, a removal of the deposit may sometimes be a desirable object to the proprietor; as where it is made from a city in danger to one in security; or to the particular city in which the proprietor dwells.—Now as the *keeping* of an article is not, in its common acceptation, limited to cities, it follows that a commission for keeping is not limited to any particular city. It is otherwise in a case of *hire* for keeping, as hire is a contract of exchange, which requires a delivery of the subject of the contract (namely, *keeping* or *guarding*) in the place where the contract is executed.—It is to be observed that this case proceeds on a supposition of the contract being absolute, the road which the trustee travels safe, and the journey necessary: for, if the road be dangerous, or the journey not necessary, the trustee is responsible, according to all our doctors.—If, also, the journey be not necessary, and the trustee travel with all his family, he is not responsible: but if, the journey not being necessary, he should leave his family behind, he becomes responsible, as in that case it was his duty to have left the deposit with his family.

(provided the contract be absolute, the road safe, and the journey necessary.)

IF the proprietor expressly prohibit the trustee from carrying the deposit out of the city, and he nevertheless carry it out, he becomes in that case responsible for it, as the restriction so imposed is a valid one, since keeping the article in a *city* is most eligible.

unless this be expressly prohibited.

IF two men deposit something jointly with another, and one of them afterwards appear, and demand his share of the deposit, the trustee

In case of a deposit by two persons, the

trustee cannot deliver to either his share, but in presence of the other.

tee must not give it, unless in the presence of the other depositor, according to *Haneefa*. The two disciples maintain that the trustee must deliver the claimant his share;—and the same is also said in *Kadooree's* compendium. In the *Jama Sagheer* it is said that if three men deposit one thousand *dirms* with a particular person, and two of them afterwards disappear, the third is not entitled to take his share, according to *Haneefa*: but according to the two disciples he is entitled to take it. (It is to be observed that this difference of opinion relates solely to articles of weight, or measurement of capacity.) The argument of the two disciples is that the depositor claims his own share only, and is therefore entitled to receive it, where it is attainable, in the same manner as a copartner in a debt. The argument of *Haneefa* is that the person present, in claiming his own share, necessarily claims half of the absentee's, since he claims a separate and determinate portion, whereas his right is indefinite. Now where a right is mixed indefinitely with another, it is to be rendered separate and determinate only by means of division; but the trustee has no power to make a division; and accordingly, if he were to give the present claimant his share, it is not accounted a division by any of our doctors.—It is otherwise in a case of a participated debt, because, in that instance, the present creditor claims from the debtor a delivery of his right, which may be made without a division, since debt is discharged by means of similars.—With respect to what is advanced by the two disciples that “the depositor is entitled to receive his share where it is attainable,” it may be answered, that it does not from thence follow that the trustee is liable to any *compulsion* on that head:—in the same manner as where, for instance, a person deposits one thousand *dirms* with another, who is indebted in one thousand *dirms* to a third person; in which case, although it be lawful for the creditor to take his due wherever it be attainable, still it is not lawful for the trustee to pay him with the said deposit.

If a person deposit, with two men, an article capable of division, it is not lawful for either of these trustees to commit such article entirely to the other, but they must divide it, and retain each an half; whereas, if the article were incapable of division, either might lawfully keep it entirely with the consent of the other.—This is the doctrine of *Haneefa*; and such also is the law, according to him, in a case of two pawnees, to whom a thing incapable of a division is jointly pledged; for in that case either of them, with the consent of the other, may retain sole possession of it;—and so likewise, in the case of two agents empowered to buy any thing, and entrusted jointly with the purchase-money; for in that case, also, one of the parties may retain the whole of the money with the consent of the other.—The two disciples allege that it is lawful for one of the parties to take entire charge, with the consent of the other, in either case; for as the proprietor has manifested his confidence in the integrity of both, it is therefore lawful for either to deliver the deposit to the other without being responsible, in the same manner as where the deposit is incapable of division.—The argument of *Haneefa* is, that the proprietor has given his approbation to the charge being united in *two*, but not to its being vested entirely in *one*; because the act of keeping, where it relates to a *divisible* article, applies only to a *part* of the article, not to the *whole*.—The delivery, therefore, of the whole by either party to the other is without the proprietor's consent; and the party who makes such delivery is accordingly responsible.—But the receiver is not responsible, since (according to his tenets) the trustee of a trustee is not subject to responsibility. It is otherwise where the deposit is incapable of division; for where an article of that nature is deposited with two persons, it is impossible for them jointly to be concerned in the care of it every hour of the day and night, unless by turns; and the approbation of the proprietor, with respect to the whole, is therefore of necessity construed to extend to either of them in particular.

Two persons, receiving a divisible article in trust, must each keep an half.

Restrictions
are not re-
garded where
they are re-
pugnant to
custom or
convenience;

If the proprietor of a deposit say to the trustee "deliver not the deposit to your wife," and he nevertheless deliver it to his wife, he becomes in that case responsible.—It is recorded, in the *Jama Sagbeer*, that if the proprietor prohibit the trustee from delivering the deposit to any one of his family, and he nevertheless deliver it to one of his family from any unavoidable necessity, he is not made responsible by having so delivered it;—as if, for instance, the deposit be an animal, and the proprietor prohibit the trustee from giving charge of it to his slave;—or as if, being of the description of things usually committed to the care of women, he should prohibit him from delivering it to any of his wives. The compiler of the *Hedaya* remarks, that as the former of these reports is absolute, and that quoted from the *Jama Sagbeer* restricted, the first ought also to be understood as restricted; for this reason, that it is impossible to manage the conservation with an observance of the condition, which is therefore nugatory.—But if the trustee should not act from necessity,—as if, having two wives, or two slaves, the proprietor should prohibit the delivery to one particular wife, or to one particular slave, and the trustee nevertheless commit the deposit to the particular wife or slave so prohibited,—he becomes responsible, since the condition in this case is useful, as some of the family may not be trustworthy; and, as the conservation of the deposit is not incompatible with the observance of the condition, it is therefore valid.

or where they
relate to the
particular
apartment in
a house.

If the proprietor say to the trustee, "Keep the deposit in this apartment of this *Serai*," and he keep it in another apartment of the same *Serai*, in that case he is not responsible for it; because the condition was useless, in as much as there is no difference with respect to keeping in different apartments of the same *Serai*.—(If, on the contrary, he were to keep it in a different *Serai*, he is responsible; because, as a difference of *Serais* occasions a difference in the keeping, the condition is therefore of use, and the restriction is consequently valid.)—If, however, there be an evident difference between two dif-

ferent

ferent apartments of the same *Serai*, (as if, the *Serai* being extensive, the apartment prohibited should be full of holes and crevices,) the condition so made is valid, and the trustee becomes responsible in case of preserving it in that apartment.

If a person deposit something with another, and that other again deposit it with a third person, and it be lost in this person's hands, in that case the proprietor of the deposit, according to *Haneefa*, must take a compensation from the first trustee, not from the second. The two disciples allege that the proprietor is at liberty to take the compensation either from the first or second trustee; and that, in case he should take it from the first, he [the first] is not empowered to take an indemnification from the second; but that, in case of his taking it from the second, the second is then entitled to take an indemnification from the first.—The reasoning of the two disciples is that the second trustee has received the deposit from the hands of a person who has himself become responsible*, and is therefore responsible;—in the same manner as the trustee of an usurper;—that is to say, if an usurper deposit with any person the goods he has usurped, and they be lost in the trustee's hands, the proprietor is at liberty to take a compensation either from the usurper or the trustee; and so also in the case in question.—The ground of this is, that the proprietor of the deposit not having given his approbation to the *second* deposit, the first trustee was guilty of a transgression; and the second trustee was also guilty of a transgression in having received it without the consent of the proprietor.—The proprietor, therefore, has the option of taking a compensation from either.—If, however, he take the compensation from the *first* trustee, he [the first trustee] is not in that case entitled to indemnify himself from the second; because, upon paying the compensation, he becomes proprietor, which constitutes the second a legal trustee; and a legal trustee is not responsible for the deposit.—If, on

Where the deposit is transferred to a *second* trustee, and lost, the proprietor receives his compensation from the original trustee.

* In consequence of the deviation from his trust.

the

the contrary, the proprietor take the compensation from the *second* trustee, he [the second] is in that case entitled to an indemnification from the first; because, as not being a legal trustee, he must be considered merely as an agent for conservation on behalf of the original trustee; and as such he is entitled to an indemnification for whatever losses he may sustain, connected with the agency.—The reasoning of *Haneefa* is, that the second trustee received the article from the hands of a *trustee*, and not of a *responsible* person; because the first trustee does not become responsible until the thing be separated from the second trustee; since so long as it is in existence with him, the wisdom and judgment of the first trustee are considered to be, as it were, extant and at hand with regard to it.—The proprietor, moreover, is supposed assenting to any mode of keeping his property which may be agreeable to the trustee's judgment; and as that still continues to be exerted, it follows that no transgression whatever has as yet taken place.—But, upon the article being lost by the second trustee, the first trustee is held to abandon the charge he had undertaken, and is therefore responsible.—The *second* trustee, on the other hand, continues in his original predicament; that is, his seizure is a seizure of trust in the *end*, in the same manner as it was at the *beginning*; and as he is not found in any transgression, he therefore is not responsible for the deposit;—in the same manner as where the wind blows a gown near to any person, and it is afterwards destroyed, in which case that person is not responsible.

Case of claim advanced by two persons to a sum of money in the possession of a third.

IF two persons should separately claim a thousand *dirms* in the possession of a third, each asserting that he had deposited them with him, and the possessor deny their claims, but refuse to take an oath to that effect, the thousand *dirms* must, in that case, be divided between the two claimants, and the defendant remains answerable to them for one thousand more.—The reason of this is, that the claim of each several claimant is valid, as the claim of each has the probability of truth.—Hence each is entitled to exact an oath from the defendant,

fendant, who, on his part, is required to make a separate deposition with respect to each, as the right of each is distinct. The *Kâzee*, in administering the oaths, may lawfully begin with either, since it is impossible to administer both at the same time, and neither has ground of preference over the other.—If, however, a contention should take place between the claimants on this point, the die must be thrown in order to satisfy them, and to remove any suspicion of partiality on the part of the *Kâzee*.—If he then take an oath in denial of the claim of one, let another oath be administered to him in denial of the second's claim; and if he thus make oath, denying the claims of both, nothing is due from him, for want of proof.—If he should refuse to take the second oath, a decree must be passed in favour of the second claimant, since the proof is established.—If, on the contrary, he refuse to take the *first* oath, a decree must not be passed in favour of the first claimant, but an oath must be tendered to him with regard to the claim of the second.—It were otherwise if, at the time of refusing, he were to make an acknowledgment in favour of the first; for in that case a decree would immediately pass; since acknowledgment is proof and a cause of property in itself; whereas a refusal to take an oath is neither proof, nor a cause of property, unless in conjunction with the decree of the *Kâzee*. It is therefore lawful for the *Kâzee*, in such a case, to suspend his decree until he shall have tendered the second oath, that he may be apprized of the full extent to which his decree is to go:—and if the defendant refuse to take the *second* oath also, the *Kâzee* must then pass a decree equally in favour of both; because neither party has a superiority over the other in point of proof; and no regard whatever is paid to priority of refusal [to swear,] since the two refusals do not constitute proof separately, but together and at one period, namely, at the period of the decree of the *Kâzee*;—and as, if both had adduced evidence, no superiority would have been given to either evidence on the ground of priority, so also in the present instance.—The defendant must also give a compensation of another

thousand *dirms* to the claimants, since in paying them the *one* thousand which was present he only pays each half his due. — Supposing that the *Kázee*, in consequence of a refusal to take the first oath, should immediately pass a decree in favour of the first claimant, without waiting to tender an oath with respect to the claim of the other, in this case *Imám Aleé Yezádee*, in his commentary upon the *Jama Sagbeer*, says that an oath must be tendered with regard to the second; — and if the defendant refuse to take it, a decree must then be passed jointly, in favour of both claimants, in an equal degree; because the decree in favour of the *first* claimant was not destructive of the right of the *second*, since the precedence, in the administration of the oath, was determined either by the will of the *Kázee*, or the chance of the die; and neither of these have power to destroy the second's right. — *Khasáf* has substituted a *slave* in this case; that is, instead of one thousand *dirms*, he has supposed the dispute to relate to a slave; and he maintains that the sentence ought to be executed in favour of the first claimant, since the matter is uncertain, in as much as several of the learned have given it as their opinion, that a decree should be passed in favour of the first without waiting for the second, as a denial to take an oath is equivalent, by implication, to an acknowledgment. — He, moreover, remarks, that the oath with respect to the second claimant must not be administered to this effect, “this slave is not the slave of such an one,” because a refusal on the part of the defendant to take such an oath is of no consequence, after the slave in question had been proved to be the property of another. — The tenor of the oath, therefore, must be “there is nothing due from me to this man; not this slave, nor the value of him, (which is so much,) nor less than the said value.” — He also observes, that it is requisite this oath be administered, according to *Mohammed*; but not according to *Aboo Yoosaf*; because if a trustee should make an acknowledgment of the deposit in favour of a certain person, and the

the thing acknowledged should by a decree of the *Kâzee* be given to another, then, according to *Mohammed*, the acknowledger is responsible, but not according to *Abou Yoosaf*.—Now the case in question is a branch of this case relative to the acknowledgment of a deposit; and consequently the law in the one case is the same as in the other.—The case of acknowledgment here alluded to, is where a person first acknowledges a particular slave to be the property of a particular person, and afterwards denies it, averring that another person had *deposited* the slave with him, and a decree is passed in favour of the first acknowledgee, because of the second acknowledgment being a retraction of the first;—in which case, if he should have given the slave to the first without a decree of the *Kâzee*, he is responsible, in the opinion of all our doctors; or if he should have given the slave by the decree of the *Kâzee*, in that case also, according to *Mohammed*, he is responsible, because he acknowledges his obligation to keep the slave on account of the second, and yet he destroys the said slave, (that is, so far as relates to the claim of the second,) by means of his acknowledgment, and is consequently responsible.—According to *Abou Yoosaf* he is not responsible in this instance, because, as he holds, it is not the immediate act of *acknowledgment* that destroys the slave, so far as relates to the right of the other, but the giving of him to the other, which is the necessary consequence of the order of the *Kâzee*. *Mohammed*, on the other hand, maintains that it was he who urged the *Kâzee* to pass that decree; whence he is responsible. Now the reason for assimilating the case in question with this one is, that the acknowledgment in favour of the second claimant, after the first had acquired a right to the thing, is useful to the second claimant, in as much as (in the opinion of *Mohammed*) it induces a responsibility in his favour. Hence, in this case, it is requisite, according to *Mohammed*, to administer an oath to the second claimant, notwithstanding the slave have been proved to be the right of the

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first,

first, because the object from it is to obtain a refusal to take the oath, which is equivalent to an acknowledgment; and an acknowledgment, even in that case, is useful, as it induces responsibility. According to *Abou Yoosaf*, on the contrary, an oath is not to be administered; because, in the same manner as the defendant is not made responsible by an acknowledgment, so neither is he by a refusal to swear, and hence the tendering of an oath is useless.

H E D A R A.

B O O K XXIX.

Of AREEAT, or LOANS.

AREEAT, according to our doctors, signifies an investiture with the *use* of a thing without a return.—The person who so grants the use is termed *Moyeer*, or the *lender*; the person receiving it, *Moostayir*, or the *borrower*; and the article of which the use is granted, *Areeat*, or the *loan*.—*Kaorokbee* and *Shafëi* define *Areeat* to signify, simply, a *licence to use the property of another*, because it is settled by the word *Ibâbit*, signifying *licence* or *permission*. Besides, a specification of the period is not a necessary condition in a loan: but if a loan were an *investiture*, it would not be valid without such specification, since without a specification of the period the full extent of the use cannot be ascertained, and an investiture with any thing unascertained

Definition of
Areeat, and
the nature of
the *use* granted
in a loan.

tained is invalid. A loan, moreover, is rendered null by a recall, whereas, if it were an *investiture* with the use, it could not be rendered null by a recall, in the same manner as a *lease* cannot be annulled by a recall. Further, the borrower is not entitled to *hire* the loan; whereas, if it were an *investiture*, he might let it out to hire, because whosoever is himself proprietor of a thing may constitute another proprietor of it. Our doctors, on the other hand, argue that the word *Areeat* indicates an *investiture*, since it is derived from *Areeya*, which signifies a *grant*; and that, accordingly, in forming the contract the expression *investiture* is used. The *use* of a thing, moreover, is capable of being property, in the same manner as the actual thing itself; and as investiture with the *latter* may take place either with or without a return, so also with respect to the *former*.—With respect to what *Koorokbee* urges concerning the term *Ibáhit*, it may be replied that this term is not uncommonly used to express *investiture*, since it is used in settling contracts of *lease*, which are an investiture with respect to the use of the thing hired.—With respect to his conclusion, that “if a *loan* were an *investiture* it would not be valid “without a specification of its period, because of uncertainty,”—it may be replied that uncertainty, in loans, is of no consequence, as it cannot be productive of strife, in as much as loans are not binding*, whence the uncertainty cannot be injurious. It is to be observed that a recall operates in a loan, because a recall is a prohibition with respect to the enjoyment of the use, and after such prohibition the use, of consequence, ceases to be the property of the borrower. The borrower, moreover, is not competent to let out to hire the thing borrowed, since that is attended with an injury to the lender, as will be hereafter explained.—It is also to be observed that *investiture* is made in four different shapes. I. By *sale*, which is an investiture with substance, for a return.—II. By *gift*, which is an investiture with substance, without a return.—III. By *lease* or *hire*, which is an investi-

* That is, may be retracted at pleasure.

ture with the use of a thing for a return.—IV. By *loan*, which is an investiture with the use of a thing without a return, as before explained; and which is lawful, as being a species of kindness; because God has said “DO KINDNESS TO EACH OTHER;” and also, because the prophet borrowed a suit of armour from *Sifwan*.

A DEED of loan is rendered valid by the lender saying “I have *lent* you this,” as there the purpose is expressly mentioned; or, by his saying “I have given you to eat of this earth,” because such an expression is used to denote a loan metaphorically; for as it is impossible to eat of the earth itself, the meaning is therefore construed “to eat of the *produce* of it *.”

Forms under which it is granted.

THE lender is at liberty to resume the loan whenever he pleases; because the prophet has said “*MOONHA is liable to be recalled, and a loan must be returned to the proprietor*; (*Moonba* is a species of loan, where a person lends another a goat, a cow, or a she-camel, for instance,) that he may use their milk;—and also, because the produce, or use of the thing lent, becomes property, particle by particle, merely according as it is brought into being; hence, with respect to such part of the produce as is not yet brought into being, there is merely an *investiture*, but no *seizin*: retraction with respect to such part is therefore valid.

The lender may resume it at pleasure.

A LOAN is a trust. If, therefore, it be lost in the hands of the borrower, without any transgression on his part, he is not answerable for it, whether the loss happen at the period of his using it, or otherwise.—*Shafai* maintains that he is responsible for it in case the loss should take place at a time when he is not using it; because he has taken possession of the property of another without a right in it; and also, because as the borrower is liable to the charges of removal, in case of

The borrower is not responsible for the loss of it, unless he transgress respecting it.

* Some cases are here omitted, as they turn entirely upon different modes of expression, in the original idiom.

the existence of the substance, so also he is answerable for the value, in case of its destruction, in the same manner as an usurper, the article standing in the same predicament with merchandize detained with a view to purchase.—With respect to the *permission* of seizure, established on the borrower's behalf, that was granted merely with a view to enable him to enjoy the use; and hence, where the use ceases it no longer operates;—in other words, where the loan is destroyed during his enjoyment of the use, he is not responsible, because of the existence of the necessity; whereas, if it be lost at a time when he is not using it, he is responsible, because of the non-existence of the necessity at that time. The argument of our doctors is, that the term *Areeat* does not indicate responsibility; for (according to *their* exposition) it is an *investiture* with the use without a return, or (according to *Shafei* and *Koorokbee*) a *permission* of the use; and the seizure of it is not a transgression on the part of the borrower, since it was made with the consent of the lender; and although that consent was merely with a view to enable the lender to *use* the article, still the borrower did not make the seizure with any *other* intention: he, therefore, is not guilty of any transgression; and consequently is not responsible.—In reply to what *Shafei* urges it may be observed, that the expence attending a removal of the article is incumbent on the borrower, merely on account of the advantage he derives from it, in the same manner as the maintenance of a loan is incumbent upon the borrower, on account of the advantage he derives from it, and not on account of any defect in his tenure. It is otherwise in the case of an *usurper*, where the charges of removal are due merely because of the defect in his tenure.—With respect to seizure with a view to purchase, the responsibility in that instance does not arise from the seizure, but from the design with which it was made; for as seizure in virtue of a contract of sale induces responsibility, so also seizure with an *intention* of purchase induces responsibility, since seizure with a view to any contract is subject to the same laws with that contract, as has been explained in its proper place.

It is not lawful for a borrower to let out a loan. If, therefore, he should let it out, and it be afterwards lost, he is in that case responsible for it; because a loan is inferior to a lease, and an inferior cannot comprehend its superior; and also, because if the hire be valid, it can only be so on the supposition of its being binding; and that cannot be supposed otherwise than with the consent of the lender; for if it were binding without his consent, it would be a great injury to him, as it would deprive him of the power of resuming the loan, until the expiration of the lease.—The lease of a loan is therefore invalid.—It is to be observed that, in case of letting out the loan, the borrower becomes responsible for it immediately upon the delivery to the lessee; for as the act of lending does not comprehend *hire*, it follows that such delivery is an usurpation. The lender is in this case at liberty to take the compensation, if he please, from the lessee, because of his having taken the property of another without his consent. If, however, he take it from the borrower, he is not then entitled to any indemnification from the lessee, since, in consequence of his receiving a compensation from the borrower, it becomes evident that the borrower only let his own property.—If he take the compensation from the lessee, the lessee is in that case entitled to an indemnification from the borrower, who is the lessor, provided he [the lessee] had not known that the lease was a loan, as in that case he suffers an imposition. It is otherwise where he takes the lease knowing it to be a loan, as there he suffers no imposition.

He cannot let
it out to hire:

or, if he let
it, he becomes
responsible.

It is lawful for a borrower to lend the thing borrowed, provided it be of such a nature as may not subject it to be differently affected by different uses*.—*Shafei* is of opinion that the borrower is not entitled

He may lend
it to another
person, unless
this subject it

* Thus if the loan be a cow or a goat, as the object from these is milk, it matters not whether for this purpose they remain with *Zeyd* or *Omar*.—But if the loan be a riding-horse, it may be of consequence that *Zeyd* should not lend it to *Omar*, for if *Zeyd* be thin and *Omar* fat, *Omar's* use of the horse would in that case affect it more than the use of it by *Zeyd*.

to be differently affected.

to lend the loan to another, because (according to him) a loan is merely a *permission of the use*, and a person to whom the use of a thing is permitted is not entitled to communicate that permission to another, for this reason, that the use of a thing is not capable of being property, as it is a non-entity, the use being considered as an entity in the case of a lease merely from necessity, which in a loan may be completely answered by permission.—Our doctors, on the other hand, argue that as a loan is an investiture with the use of a thing, the borrower may therefore lend the loan, in the same manner as a person to whom the use of a thing devolved by bequest.—Besides, in the same manner as the use is made property in the case of a *lease*, so also is it, from a principle of necessity, in the case of a *loan*.

OBJECTION.—If a *loan* signify an investiture with the use, it would necessarily follow that the borrower is at liberty to lend the loan even where a difference of use may occasion a different affection in the thing; whereas the law is otherwise.

REPLY.—It is not permitted to the borrower to lend the thing borrowed when of a nature to be differently affected by different use, because of the possibility of the use of the second borrower being more injurious to the thing than that of the first; and the consent and approbation of the first lender is given to the use of the *first* borrower, but not to that of the *second*.—The compiler of the *Hedaya* remarks that what is here related proceeds on the supposition of the loan being absolute; for that loans are of four kinds. I. Loans that are absolute with respect both to the period and the use; in which case the borrower is entitled to take the use in any manner and at any time he pleases, because of the loan being absolute.—II. Loans that are restricted both as to the use and the time, in which case the borrower is not allowed to depart from these restrictions, excepting where the deviation is in an instance that is similar to the one prescribed, or of a better kind; as where a person borrows a quadruped in order to load it on a particular day with ten measures of a particular kind of wheat; and he loads it on that day with ten measures of a different kind of wheat,

wheat, or with less than ten measures of the same or a different kind of wheat.—III. Loans that are restricted in point of time, but absolute with respect to the use;—and IV. Loans that are restricted with respect to the use, but absolute with respect to time;—in either of which it is not lawful for the borrower to depart from the restrictions.—If, therefore, a person borrow a quadruped without any conditions whatever, he is in that case entitled either to load it on his own account, or to lend it to another for the purpose of lading, as in lading there is no difference; and, in the same manner, he may either ride upon it himself, or lend it to another for that purpose:—but as riding is supposed to be of different kinds, he is not entitled to more than one kind, which his own act must fix and determine; and hence, if he should ride upon it himself, he is not afterwards at liberty to lend it to another to ride; or, if he should lend it to another to ride upon, he is not afterwards entitled to ride upon it himself.

THE loan of *dirms* and *deenars*, and of articles estimated by measurement of capacity, by weight, or by tale, is considered in the light of *Karz* *.—The principle on which this proceeds is that *Arceat* is an investiture with the use [of the property lent;] and as this cannot be obtained, with regard to these articles, without a destruction of the substance, it must, with respect to them, be necessarily considered as an investiture with the substance.—Now an investiture of this nature is to be considered in two lights,—a gift or a loan †:—the act

Loans of money, &c. as opposed to loans of specific property.

* *Arceat* and *Karz* are, in common conversation, used indiscriminately to denote a loan; but there is a distinction in law with regard to them. *Arceat* is used with respect to such things as, after being lent to another, are identically returned to him; and *Karz*, with regard to such things as are returned, not identically, but equal in point of number, weight, or measurement of capacity.—Thus where a person, having borrowed a book, and read it, afterwards returns it, it is considered as *Arceat*; but if a person should borrow one hundred *dirms* from another, and after using them should return another hundred *dirms*, it is considered as *Karz*.

† Arab. *Karz*.—As the English language makes no distinction between the terms

act is, however, regarded as a *loan* in this instance, either because *loan* is more probable than *gift*, or because the objects of a loan are twofold,—namely, the use of the article, and the restitution of the substance: and in the loan of the articles in question, a restitution of an equivalent is admitted in place of the identical substance.—Lawyers, however, have observed that this doctrine proceeds on the supposition of the loan being absolute: for if it be limited, (as if a person should lend another a quantity of *dinms* merely to place in his shop and attract customers from the persuasion of his being rich,) it is not in this case a *Karz*-loan, but an *Areeat*-loan, whence he is not entitled to derive any other use from it than what was specified: the case, therefore, becomes the same as if he had borrowed a *vessel* or a *sword* to decorate his shop.

Land may be borrowed for the purpose of building or plantations: but the lender is at liberty to resume it.

If a person borrow *land*, with a view to build upon it, or plant trees in it, it is lawful; because the use to which the loan is to be applied is here ascertained; and as such use is the subject of property in *leases*, so also in *loans*.—But in this case it is permitted to the lender to resume the land; and as he is to receive it back in the state in which he lent it, he is therefore empowered to compel the borrower to remove his houses or trees.—It is to be considered, however, whether or not any period was fixed for the loan.—If no period was fixed, then no compensation is due by the lender for the loss he may have occasioned to the borrower by the destruction of his buildings or trees, since no deceit was practised on the borrower, but rather he deceived himself, in trusting to a contract which was absolute and unaccompanied with any condition.—If, on the other hand, a period was fixed for the loan, and it be resumed before the expiration of that period, the resumption so made is valid, since a lender (as was before *Karz* and *Areeat*, (although essentially different in their effect,) the translator is under the necessity of adopting the term *loan* in both instances;—leaving it to the reader to conceive the original term from the context.

explained)

explained) may resume a loan when he pleases: but it is nevertheless *abominable* in this instance, as it involves a breach of promise, and the lender is responsible to the borrower for the loss he sustains in the removal of his trees and buildings, in as much as he deceived the borrower in fixing a period which it was natural to suppose he would adhere to:—the borrower, therefore, is entitled to a compensation from the lender, in consideration of the damage he receives: and the same is mentioned by *Kadooree* in his compendium.—*Hakim Shabeed* maintains that the borrower is at liberty either to take from the lender the value of the trees and buildings, (in which case they become the property of the lender,) or to take a compensation for his loss, (in which case he is at liberty to carry away the trees and the buildings.) Lawyers have observed that if the removal of the trees and buildings be detrimental to the ground, the choice of the alternative rests with the proprietor of the ground, as he is the *principal*, and the borrower the *secondary*, and a preference is always given to the *principal*.

If a person borrow a piece of land for the cultivation of grain, the lender has not the power of resuming the loan until the gathering in of the grain, whether a period have been fixed or not; because the gathering of the crop comes within a certain and known period; and in suffering it to remain on the ground, an observance of the right of both the lender and borrower is maintained, in the same manner as, under similar circumstances, in the case of a *lease*. It is otherwise with respect to *trees*; because, as the period of their existence is uncertain, the suffering them to remain would be an injury to the lender.

Land borrowed for the purpose of tillage cannot be resumed until the crop be reaped from it.

THE charges of returning the loan must be defrayed by the borrower; because, as the restitution of it is incumbent on him, (since he took it with a view to his own benefit,) he is consequently liable to the expences attendant on such restitution.—It is to be observed that the expences attending the return of the subject of a lease are incumbent

The borrower must defray the charges attending the restoration of a loan.

cumbent on the lessor; because the rent being a return for the benefit arising from the tenure of the article let, all that is required from the lessee is merely to put it in the power of the lessor to recover it, by divesting himself of it, and not that he should return it to him.—The expence of returning the subject of an *usurpation*, on the contrary, must be defrayed by the usurper; for as the return of the article to the proprietor is incumbent on the usurper of it in order to remedy the injury he occasioned, so the expence attendant on such return must of consequence be borne by him.

In restoring
an animal
borrowed, it
suffices that it
be returned
to the owner's
stable;

If a person, having borrowed a quadruped from another, should restore it to the stable of the proprietor, and it be afterwards lost, in that case he is not responsible for it, on a favourable construction.—Analogy would suggest that he is responsible, since he has neither restored it to the proprietor nor his agent, but merely to his ground.—The reason for a more favourable construction of the law in this instance is, that a restitution has here been made according to general custom, since it is customary to restore loans to the house of the proprietor; as where, for instance, vessels or utensils belonging to a house are borrowed, in which case it is usual to return them, not into the proprietor's hands, but merely to his *house*.—Besides, if he had returned the quadruped to the proprietor, he [the proprietor] would have sent it to the stable, and therefore his doing so at once is considered as a valid return.

and, in re-
storing a
slave, that he
be returned
to his master's
house.

If a person borrow a slave, and afterwards return him to the house of his master without delivering him, personally, to the master himself, he is not in that case responsible for him for the reasons above-mentioned.—If, on the contrary, an usurper or a trustee return the subject of the usurpation or the trust to the house of the proprietor, without delivering it to the proprietor, they are in that case responsible for the eventual loss of it:—the usurper, because it was incumbent on him to undo his act, and his act cannot be undone but by a delivery

delivery to the proprietor himself; and the trustee, because the proprietor did not wish that he should deliver the deposit merely to his *house* or his *family*, for if that had been the case, he would not have deposited it with him.—It is otherwise with respect to *loans*, as these are commonly returned to the *house*: excepting, however, where they consist of *jewels*, for in that case they must be returned to the *proprietor*, and not to the *house* or *family*.

If the borrower send the quadruped he had borrowed to the proprietor of it, by his own slave or his hireling, and it be lost in the way, in that case he is not responsible for it.—(By *hireling* is here to be understood a servant who receives *yearly* wages.)—The reason of this is that a loan is in the nature of a trust; and the borrower may commit it, for the sake of preservation, into the hands of any of his family, in which relation a slave and a yearly servant stand.—It is otherwise with respect to a *daily* servant, as he is not held to be one of the family.

It suffices to return the loan by a slave or servant either of the borrower

If a borrower should send back the horse or other animal he had borrowed to the proprietor, by the slave or the hireling of the proprietor, and it be lost or destroyed on the way, he is not responsible for it, since the proprietor is virtually supposed to have approved of this, in as much as he himself, if a delivery had been made to him, would have consigned the horse to one of these.—Some have said that the law here proceeds on the supposition of the slave or hireling, to whom the quadruped is consigned, being the one to whom the care and management of it is always given. Others, again, have said that it matters not whether it be consigned to such a slave, or to any other slave of the proprietor: and this latter is the most approved doctrine.

or lender.

IF

If it be returned by a stranger, the borrower is responsible.

IF a borrower should send the quadruped to the proprietor by the hands of a stranger, he becomes in that case responsible for it, and must make good the value in the event of its loss.—It is to be observed that this case seems to imply the illegality of a borrower's *depositing* a loan with a stranger; since, if that were lawful, he would not, in the present instance, be responsible.—Such also is the opinion of some of our modern doctors.—Others of them have said that it is lawful for a borrower to *deposit* the loan, because the contract of deposit is inferior to that of loan; and they have reconciled the doctrine, in the present case, by observing that the borrower does necessarily become responsible on sending the loan by a stranger, since from the moment of his consigning it to a stranger the loan determines, and being no longer a *borrower*, he becomes of consequence responsible.—Our doctors, however, do not admit the legality of a borrower's deposit, unless he be the borrower of a borrower, which in fact is not a *borrower*.

Terms in which a contract of loan with respect to land must be expressed.

IF a person lend a piece of fallow ground to another, that he may cultivate it, the borrower must insert, in the contract of loan, the words “ You have given me to eat of this land.”—This is according to *Haneefa*. The two disciples have said that the term *Areeat* or *loan* must be inserted; because the term *Areeat* is particularly used to express a *loan*; and it is preferable that a contract of loan be expressed in terms particularly appropriated to loans;—as in the loan of a *house*, for instance, where the borrower expresses the contract “ You have *lent* me this house.” The argument of *Haneefa* is, that the words “ You have given me to eat “ of this land,” are more expressive of the fact, since the term *Itaam* [giving to eat] is particularly restricted to the *produce of land*; whereas the words “ You have lent me this ground,” may

may apply to any other object, such as building, or the like.—
The use of the former, therefore, in the case in question, is by
much the most advisable.—It is otherwise with respect to a *house*,
because the loan of it is given for no other purpose than that of
residence.

power's depositing a loan with a stranger, since, if that were the case, he would not, in the present instance, be responsible.—Such also is the opinion of some of our modern doctors.—Others of them have said that it is lawful for a borrower to deposit the loan, because the contract of deposit is inferior to that of loan; and they have reconciled the doctrine, in the present case, by observing that the borrower does necessarily become responsible on lending the loan by a stranger, since from the moment of his contracting it to a stranger the loan determines, and being no longer a borrower, he becomes of consequence responsible.—Our doctors, however, do not admit the legality of a borrower's deposit, unless he be the borrower of a borrower, which in fact is no

is a person land a piece of fallow ground to another, that he may cultivate it, the borrower must insert, in the contract of loan, the words "You have given me to eat of this land."—This is according to Hameza. The two disciples have said that the term *thekot* or loan, must be inserted; because the term *thekot* is particularly used to express a loan; and it is preferable that a contract of loan be expressed in terms particularly appropriated to loans, as in the loan of a house for instance, where the borrower expresses the contract "You have given me this house." The argument of Hameza is, that the words "You have given me to eat of this land," are more expressive of the fact, since the term *thekot* is particularly restricted to the present case. The words "You have given me this ground,"

H E D A R A.

B O O K XXX.

Of H I B B A, or G I F T S.

Definition of
the terms used
in gift.

HIBBA, in its literal sense, signifies the donation of a thing from which the *donee* may derive a benefit: in the language of the LAW, it means a transfer of property, made immediately, and without any exchange.—The person making the transfer is termed the *Wàhib*, or *donor*;—the person to whom it is made the *Mohob-le-hoo*, or *donee*;—and the thing itself the *Mohob*, or *gift*.

Chap. I. Introductory.

Chap. II. Of Retraction of a Gift.

CHAP.

C H A P. I.

DEEDS OF GIFT are lawful; because the prophet has said, "*Send ye presents to each other for the increase of your love,*" which implies the legality of gifts, as by *presents* is meant *gifts*. All our doctors, moreover, concur in the validity of them.

Gifts are lawful;

GIFTS are rendered valid by tender, acceptance, and seizin.—Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts: and seizin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the *contract*, without seizin.—*Malik* alleges that right of property is established in a gift antecedent to seizin, because of its analogous resemblance to sale: and the same difference of opinion obtains with respect to *alms-gift*.—The arguments of our doctors upon this point are twofold.—FIRST, the prophet has said, "*A gift is not valid without seizin,*" (meaning that the right of property is not established in a gift until after seizin.)—SECONDLY, gifts are voluntary deeds; and if the right of property were established in them previous to the seizin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it.—It is otherwise with respect to *wills*; because the time of establishment of a right of property in a legacy is at *the death of the testator*; and he is then in a situation which precludes the possibility of rendering any thing binding upon himself.

and rendered valid by tender, acceptance, and seizin.

OBJECTION.—Although a dead person be not capable of being bound, still an obligation may lie against his heir, who is his successor and representative.

REPLY.—The heir is not proprietor of the legacy, and cannot therefore be subjected to obligation on account of it.

A gift may be taken possession of on the spot where it is tendered, without the express order of the donor; but not afterwards.

If the donee take possession of the gift, in the meeting of the deed of gift *, without the order of the giver, it is lawful, upon a favourable construction.—If, on the contrary, he should take possession of the gift after the breaking up of the meeting, it is not lawful, unless he have had the consent of the giver so to do.—Analogy would suggest that the seizure is not valid in either case, as it is an act with respect to what is still the property of the giver; for as his right of property continues in force until seizure, *that* is consequently invalid without his consent. The reason for a more favourable construction of the law, in the instance in question, is that seizure, in a case of gift, is similar to acceptance in sale, on this consideration, that in the one the effect of the deed (that is, the establishment of a right of property) rests upon the *seizure*, and in the other upon the *acceptance*.—As, moreover, the object of a gift is the establishment of a right of property, it follows that the tender of the giver is, virtually, an empowerment of the donee to take possession.—It is otherwise where the seizure is made after the breaking up of the meeting; because our doctors do not admit of the establishment of the power over the thing but when seizure is immediately conjoined with acceptance; and as the validity of acceptance is particularly restricted to the place of the meeting, so also is the thing which is conjoined with it.—It is also otherwise where the giver prohibits the donee from taking possession in the place of meeting, for in that case the seizure of the donee in the place of the meeting would be invalid, as arguments of

* Arab. *Majlis Akid al Hibba*;—meaning, the place where the deed is executed.

* implied

implied intention cannot be put in competition with express declaration.

*A GIFT of part of a thing which is capable of division is not valid unless the said part be divided off and separated from the property of the donor: but a gift of part of an *indivisible* thing is valid. *Shafei* maintains that the gift is valid in either case; because a gift is a deed conveying property, and valid, as such, with regard either to things that are connected or separated; in the same manner as in sale.—The ground of this is that as an indefinite share has the capacity to constitute property, it is consequently a fit subject of gift: nor is a voluntary deed rendered null by the indefiniteness of the subject of it; as in a *Karz*-loan, for instance, where a person gives another one thousand *dirms*, of which one half is to be in the nature of a loan, and the other of copartnership; or as in *bequest*; or in the gift of *indivisible* things.—The arguments of our doctors upon this point are twofold.—FIRST, seizin in cases of gift is expressly ordained, and consequently a complete seizin is a necessary condition: but a complete seizin is impracticable with respect to an indefinite part of *divisible* things, as it is impossible, in such, to make seizin of the thing given without its conjunction with something that is *not* given; and that is a defective seizin.—SECONDLY, if the gift of part of a divisible thing, without separation, were lawful, it must necessarily follow that a thing is incumbent upon the giver which he has not engaged for,—namely, a *division*, which may possibly be injurious to him; (whence it is that a gift is not complete and valid until it be taken possession of; since if it were valid before seizin, a thing would be incumbent upon the donor which he has not engaged for,—namely, *delivery*.)—It is otherwise with respect to articles of an *indivisible* nature; because in

A gift made from *divisible* property must be divided off;—but not a gift made from *indivisible* property.

* A small portion of the text immediately preceding, which relates to words synonymous, either directly, or by implication, to the word *Hibba*, or gift, has been necessarily omitted in the translation.

those

those a *complete* feizin is altogether impracticable, and hence an *incomplete* feizin must necessarily suffice, since this is all that the article admits of;—and also, because in this instance the donor does not incur the inconvenience of a division.

OBJECTION.—Analogy would suggest that the gift of a part of an indivisible article is invalid; because, although the donor do not, in such a case, incur the inconvenience of a division, still he incurs a participation in the property; and this also is a sort of inconvenience.

REPLY.—The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the *use* [of the whole indivisible article,] for his gift related to the *substance* of the article, not to the *use* of it:—hence the necessity of a participation is not incurred by him with respect to the thing which is, properly, the subject of his grant.

—With respect to the analogy advanced by *Shaf'ei* between the case in question and that of *Karz-loan*, or bequest, it is totally unfounded; because in bequests the feizin [of the legatee] is *not* a necessary condition; neither is it so in a valid sale;—and although feizin be requisite in *Sillim* and *Sirf* sales, still it is not ordained with respect to them, and hence is not required to be *complete* in those instances. Besides, as all those contracts [of sale] are contracts of responsibility, the obligation of a division is agreeable to them.—With respect to a *Karz-loan*, it is a voluntary contract in the *beginning*, but a contract of responsibility in the *end* (since it involves responsibility for a *similar*;) and hence, in consideration of its resemblance to both, an *incomplete* feizin is made a condition in it, not a *division*: besides, feizin is not especially ordained in this instance.

If a person make a gift, to his partner, of his share in the partnership-stock, capable of division, it is invalid, because of the invalidity of the gift of an undefined part of a divisible subject, as before explained.

IF a person make a gift, to another, of an undefined portion of land, (such as an *half*, or a *fourth*,) such gift is null, for the reasons already set forth.—If, however, he afterwards divide it off, and make delivery of it, the gift becomes valid; because a gift is rendered complete by feizin; and in this case nothing else remains indefinitely involved with the gift at the time of feizin.

IF a person make a gift of the flour of wheat, which is yet in grain, or of oil of *Sessamé* which is not yet expressed from the seeds, such gift is invalid; and if he afterwards grind the wheat into flour, or extract the oil from the *Sessamé* seeds, and so deliver them to the donee, still the gift is not thereby rendered valid.—The same rule also holds with respect to butter which is yet in milk.—The reason of this is that the thing given, in all these cases, is a nonentity; (whence it is that if an usurper of wheat, or of seeds, should either grind the one into flour, or press the other into oil, he then becomes proprietor of them;) and as a nonentity cannot be a subject of property, the deeds in question are therefore null, and cannot afterwards be rendered valid otherwise than by being executed *de novo*.—It is different in the preceding case, because an undefined portion of any thing is nevertheless capable of being transferred.

A gift of an article implicated in another article is utterly invalid.

THE gift of milk in the udder, of wool upon the back of a goat, of grain or trees upon the ground, or of fruit upon trees, is in the nature of the gift of an undefined part of a thing, because in these instances the cause of invalidity is the conjunction of the thing given with what is not given, which is a bar to the feizin, in the same manner as in the case of undivided things.

IF the thing given be in the hands of the donee, in virtue of a trust, the gift is in that case complete, although there be no formal feizin, since the actual article is already in the donee's hands, whence his feizin is not requisite. It is otherwise where a depositor *sells* the deposit

The gift of a deposit to the trustee is valid without a formal delivery and feizin.

deposit to his trustee, for in this case the original seizin does not suffice, because seizin in virtue of purchase is a seizin inducing responsibility, and therefore cannot be substituted by a seizin in virtue of a *trust*; but seizin in virtue of *gift*, on the contrary, as not being a seizin inducing responsibility, may be substituted by a seizin in virtue of a trust.

The gift, by a father to his infant son, of any thing either actually or virtually in his possession, is valid in virtue of his [the father's] seizin:

IF a father make a gift of something to his infant son, the infant, in virtue of the gift, becomes proprietor of the same, provided the thing given be, at the time, in the possession either of the father or of his trustee; because the possession of the father is capable of becoming possession in virtue of gift, and the possession of the trustee is equivalent to that of the father. (It were otherwise if the thing given have been pawned or usurped by another, or sold by an invalid sale; because a pawn and an usurpation are in the possession of another, and the subject of an invalid sale is the property of another.)—The same rule holds when a *mother* gives something to her infant son whom she maintains, and of whom the father is dead, and no guardian provided: and so also, with respect to the gift of any other person maintaining a child under these circumstances.—It is to be observed that the law with respect to seizin in cases of alms-gift is similar to that in gifts.—Thus if a person should bestow in alms, upon a pauper, any thing of which the pauper has possession at the time, he [the pauper] in that case becomes proprietor of the same, without the necessity of a new seizin; and so also, if a father should bestow in alms, upon his infant son, something of which he himself or his trustee has the possession, the infant becomes proprietor thereof:—contrary to where the thing so bestowed has been pawned, lost by usurpation, or sold by an invalid sale.

and so also, a gift to an infant by a *stranger*.

IF a *stranger* make a gift of a thing to an infant, the gift is rendered complete by the seizin of the father of the infant; for as he is master of deeds with respect to the child liable to both good and evil, (such as sale.)

sale,) he is consequently, in a superior degree, master of gift, which is purely advantageous.

IF a person make a gift of a thing to an orphan, and it be seized in his behalf by his guardian,—being either the executor appointed by his father,—or his grandfather, or the executor appointed by his grandfather, it is valid; because all these relatives have an authority over the orphan, as they stand in the place of his father.

Gift to an orphan is rendered valid by the seizin of his guardian;

IF a fatherless child be under charge of his mother, and she take possession of a gift made to him, it is valid; because she has an authority for the preservation of him and his property; and the seizin of a gift made to him is in the nature of a preservation of *himself*, since a child could not be subsisted without property.—The same rule also holds with respect to a *stranger* who has the charge of an orphan;—because as his seizin is of legal force, (whence it is that another stranger has not a right to take the orphan from him,) he is consequently competent to all such things as are purely for the advantage of the orphan.

and, to a fatherless infant, by the seizin of his mother.

IF an infant should himself take possession of a thing given to him, it is valid, provided he be endowed with reason; because such an act is for his advantage; and he has a capability of performing it, as capability depends on reason and understanding, which he possesses.

Gift to a rational infant is rendered valid by the seizin of the infant himself.

IT is lawful for a husband to take possession of any thing given to his wife, being an infant, provided she have been sent from her father's house to his; and this although the father be present; because he is held, by implication, to have resigned the management of her concerns to the husband. It is otherwise where she has not been sent from her father's house, because then the father is not held to have resigned the management of her concerns. It is also otherwise with

respect to a *mother*, or any *others* having charge of her; because they are not entitled to possess themselves of a gift in her behalf, unless the father be dead, or absent, and his place of residence unknown; for their power is in virtue of necessity, and not from any supposed authority; and this necessity cannot exist whilst the father is present.

A house may
be conveyed
in gift by *two*
persons to *one*;

If two persons, jointly, make a gift of a house to one man, it is valid; because, as they deliver it over to him wholly, and he receives it wholly, no mixture of property can be said to exist at the time of seizure.

but not by *one*
person to *two*.

If one man make a gift of a house to two men, the deed is invalid, according to *Haneefa*. The two disciples hold it to be valid, because as the donor gives the *whole* of the house to each of the two donees (in as much as there is only *one* conveyance) there is consequently no mixture of property; in the same manner as where one man pawns a house to two men.—The arguments of *Haneefa* upon this point are twofold.—FIRST, the gift, in this case, is a gift of *half* the house to *each* of the donees, (as is evident from this, that if one man give to two men something incapable of division, and one of them accept the same, the gift becomes valid with respect to his share;)—and such being the case, it follows that, at the time of seizure by each of the donees, a mixture of property must take place. SECONDLY, as a right of property is established in each of the donees, in the extent of one half, it follows that the conveyance or investiture must also be in the same proportions, since the right of property is an effect of the conveyance: on this consideration, therefore, that a right of property is established in each with respect to one half, an indefinite mixture of their respective shares in the gift is fully established.—It is otherwise in a case of *pawn*, because the effect of that is *detention*, not *right of property*, and the right of detention is wholly and completely established in each of the pawn-holders, respectively, inasmuch that if

the pawner should discharge the debt of one of them, still the right of the other to a complete detention remains unimpaired.

It is recorded, in the *Jama Sagbeer*, that if a rich man bestow ten *dirms*, in alms, upon two poor men, or make a gift of that sum to them, it is valid; but that if the said charity or gift be made to two *rich* men, it is invalid. (The two disciples maintain that in this last instance both gift and alms are valid.)—From this it appears that *Haneefa* has construed a gift into *alms*, when the object is a *poor* man; and alms into a *gift*, when the object is a *rich* man,—because of the similarity betwixt these deeds, as each is a conveyance of property without an exchange. Hence *Haneefa* has made a difference with respect to them, as appears by the case recited in the *Jama Sagbeer*, since he has admitted of charity to two poor men, but not of a gift to two *rich* men; whilst in the *Mabsoot* he has made no difference between them, but on the contrary has declared them to be equal, as he there declares “neither a gift nor alms to *two* men is valid, because “the mixture of property is a bar in both cases, as both are de-
“pendant on a perfect seizin.”—The reason of the distinction in the *Jama Sagbeer* is that the end of alms is *to give to God*, who is one; and the alms comes not to the poor men, but as their daily food from God Almighty; whereas the *gift* goes directly to the object of it, namely, *the two men*.—Some have said that the recital in the *Jama Sagbeer* is the most approved doctrine; and that the meaning of the doctrine in the *Mabsoot* is that charity to two *rich* men is invalid, in the same manner as a *gift* to two men of *any* description.

Distinction
between joint
gift or alms
to the rich
and to the
poor.

If a person make a gift to two men, of one third of his house to one of them, and of one third to the other, it is invalid according to the two disciples, and according to *Mohammed* it is valid. If, however, he make a gift of one half to one, and one half to the other, there are in that case two reports with respect to the opinion of *Aboo*

Case of the
gift of a house
in separate
lots.

Yooſaf.—According to the two principles maintained by *Haneefa* the gift in that caſe is invalid; whereas, according to the principles of *Mohammed*, it is valid.—The reaſon of the diſtinction, in the latter inſtance, as maintained by *Abou Yooſaf*, is that becauſe of the expreſs apportioning of the gift, it becomes evident that the object of the giver was to eſtabliſh a part of the property in each, by which means a mixture of the property muſt inevitably take place;—whence it is that it is not lawful for a perſon to pawn a thing into the hands of two, by apportioning an half of it ſeparately to each.

CHAP. II.

Of Retracting of Gifts.

The donor
may retract
his gift to a
ſtranger;

IT is lawful for a donor to retract the gift he may have made to a ſtranger. *Shafei* maintains that this is not lawful; becauſe the prophet has ſaid, “*Let not a donor retract his gift; but let a FATHER, if he pleaſe, retract a gift he may have made to his SON;*” and alſo, becauſe *retraction* is the very oppoſite to *conveyance*,—and as a deed of gift is a deed of conveyance, it conſequently cannot admit its oppoſite. It is otherwiſe with reſpect to a gift made by a father to his ſon, becauſe (according to his tenets) the conveyance of property from a father to the ſon can never be complete; for it is a rule with him that a father has a power over the property of his ſon.—The arguments of our doctors upon this point are twofold.—FIRST, the prophet has ſaid, “*A donor preſerves a right to his gift, ſo long as he does not obtain a return for it.*”—SECONDLY, the object of a gift
to

to a stranger is a return;—for it is a custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to a person of equal rank that he may obtain an equivalent;—and such being the case, it follows that the donor has a power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment.

With respect to the tradition of the prophet quoted by *Shafeï*, the meaning of it is that the donor is not *himself* empowered to retract his gift, as that must be done by a decree of the *Kâzee*, with the consent of the donee,—excepting in the case of a *father*, who is himself competent to retract a gift to his son, when he wants it for the maintenance of the son; and this is *metaphorically* termed a *retraction*.—

It is to be observed, however, that although a retraction of a gift be agreeable to the letter of the law, still it induces abomination; for the prophet has said “*The retraction of a gift is like eating one’s spittle.*”

It is further to be observed, that the bars to a retraction of a gift are many,—amongst which are the following:—I. The donee giving the donor a return or consideration; because this fulfills the donor’s object.—II. The incorporation of an increase with the gift; because in that instance a retraction cannot take place without including the increase, as that is implicated; and it cannot take place so as to include the increase, since that was not included in the deed of gift.—III. The death of one of the parties; for if the *donee* should die, his property shifts to his heir, and becomes the same as if it had shifted during his lifetime; and if the *donor* should die, his heirs are strangers with respect to the contract, since they made no tender of the thing given.—IV. The alienation of the gift from the donee’s property during his lifetime; because this is a consequence of the power vested in him by the gift, which power, therefore, cannot then be retracted; and also because the right of property has regenerated in another person, in virtue of a fresh cause, namely, conveyance to a second donee; and as a regeneration of the right of property is equivalent to an essential change in the thing, the case is therefore the same as if the gift were

but there are various circumstances which bar the retraction.

to

to become, in effect, a different thing from what it was, and consequently not liable to retraction.

A gift of land cannot be retracted after the donee has built or planted on it.

If a person make a gift to another of a piece of land destitute of buildings or plantations, and the donee plant trees in it, or build a house, a stable, or a shop of such a size as to be deemed an increase, in that case the donor is not entitled to retract the gift, because of the increase which it has received.—The restriction is stated with respect to the shop, because shops are sometimes so small as not to be deemed an increase, and sometimes the land is very extensive, the shop occupying only one particular part of it; in which case the bar operates only with respect to that part.

After the sale of a part of the land by the donee, the donor may resume the remainder.

If the donee sell one half of granted land undivided, the donor may in that case resume the other half, as to the resumption of that no bar exists. If, on the other hand, the donee should *not* have sold any part of the land, the donor may resume one half of it, for as he is entitled to resume the whole, it follows that he is entitled to resume the half, *a fortiori*.

A gift to a kinsman cannot be resumed:

If a person make a gift of any thing to his relation within the prohibited degrees, it is not lawful for him to resume it, because the prophet has said, “*When a gift is made to a prohibited relation, it must not be resumed;*”—and also because the object of the gift is an increase of the ties of affinity, which is thereby obtained.

nor a gift to a husband or wife during marriage.

If a husband make a gift of any thing to his wife, or a wife to her husband, it cannot be retracted, because the object of the gift is an improvement of affection (in the same manner as in the case of presents to relations;) and as the object is obtained, the gift cannot be retracted*.

* Because of the existence of the *first* bar beforementioned; for the increase of affection excited in the wife by the gift is supposed, by the law, to be a *return* which she pays for it, and which consequently deprives the donor of the power of retraction.

This

This object, however, is to be regarded only during the existent period of the contract; inasmuch that if a person give something to a strange woman, and afterwards marry her, he may retract the gift;—whereas, if a man give something to his wife, and afterwards divorce her three times, he is not entitled to retract the gift.

If the donee say to the donor “ Take this thing in exchange for “ your gift,” and he accept it, the right of retraction is annulled, because of the donor having obtained the object of his gift.

The receipt of a return prohibits retraction,

If a stranger, on behalf of a donee, give something gratuitously* to the donor in exchange for his gift, and the donor accept the same, the right of retraction then ceases; because a stranger may lawfully give a compensation for the relinquishment of a right, in the same manner as in cases of *Khoola* or composition.

although the return be given by a stranger.

If the half of a gift prove the property of some other than the donor, the donee is in that case entitled to take back from the donor half of the return he may have made him for the gift, since the thing opposed to that half was not secured and rendered safe to him. If, on the contrary, half the return prove the property of some other than the donee, the donor is not in that case entitled to take back from the donee a particular part of the gift; but he may restore the remaining part of the return, and then resume the whole of the gift from the donee.—*Ziffer* maintains that the donor may take back half of the gift, as he considers this case to be analogous to that of part of the gift proving the property of another.—The reasoning of our doctors, in support of their opinion, is that the remaining part of the return has a fitness to be considered as a return for the *whole* of the gift from the beginning: as, moreover, in consequence of half the return proving the right of another, it becomes apparent that there is no

If a part of the gift prove the property of another, a proportionable part of the return may be resumed.

* Arab. *Tibbarrān*; that is, of his own accord, and without solicitation.

other

other return for the gift than the remaining part, it follows that the donor is not entitled to resume an equivalent from the gift.—He is, however, allowed an option in this instance, with respect to the whole gift, because he did not relinquish his right of retraction on any other condition than that of the security of the whole of the return; and as that does not prove completely secure to him, he is therefore at liberty to restore the remaining half of the return, and to take back the whole of the gift.

When the return is opposed only to a part, the remainder of the gift may be resumed.

If a person make a gift of a *house* to another, and the donee give a return to the donor for a *half* only of the house so given, the donor may in that case resume the half of the house for which he received no exchange, since a bar to his retraction existed only with respect to the *other* half.

Retraction requires mutual consent, or a decree.

A GIFT cannot lawfully be retracted but with the consent of both parties, or by a decree of the *Kázee*, because the retraction of a gift is a disputed point amongst the learned. There is, moreover, a degree of weakness in a retraction, because the admission of it is contrary to analogy, since it is a power over the property of another, as the right of property in a gift is established in the donee. Besides, as there may arise a contention with respect to the object in lieu of it, (since the donor may claim something which the donee may refuse,) the contention, therefore, cannot possibly be settled but by the consent of the parties, or by a decree of the *Kázee*;—inasmuch that if the gift be a *slave*, and the donee should have emancipated him previous to the decree of the *Kázee*, the emancipation holds good. If the donor should prohibit the donee from keeping possession of the gift, and he nevertheless retain possession of it, and it be lost or destroyed in his hands, he is not responsible for it, because his right of property in it is held still to continue in force.—The same rule also holds where the gift is lost or destroyed in the possession of the donee, subsequent to the decree of the *Kázee*, but prior to the demand of it by the

the donor, because the original tenure by which he held it was not a tenure of responsibility, and that tenure still exists.—But if the donor demand the article, and prohibit the donee from keeping possession of it, *subsequent* to a decree of the *Kázee*, and the donee nevertheless continue to retain it, he is responsible for it, as he is then guilty of a transgression.

WHEN a person retracts his gift, either in virtue of a decree of the *Kázee*, or of the mutual consent of the parties, it is an annulment of the original gift, and not a gift *de novo* on the part of the donee, and therefore seizin by the donor is not in such case a requisite condition. Retracting, moreover, is lawful with respect to an undivided portion; but if a retraction were a gift *de novo*, seizin would be a requisite condition, and consequently retraction with respect to an undivided portion would not be lawful. The reason of this is that a deed of gift is valid under the reservation of a right of annulment. The donor, therefore, in annulling the deed, does no more than possess himself of his own established right; and hence a retraction is an annulment in all cases, that is, whether it take place in virtue of a decree of the *Kázee*, or by the consent of both parties.—It is otherwise with respect to a buyer's return of goods on account of a defect without a decree of the *Kázee*; for that, with respect to a *third* person, is considered as a contract *de novo*, since the purchaser has not a power of annulment, but has merely a right to the quality of safety in the goods; and in defect of that quality, he is, from a principle of necessity, allowed to annul the contract.—Its being an *annulment*, therefore, with respect to any *third* person, must depend upon the *Kázee's* decree.—Hence there is an essential difference between the retraction of a gift, and the return of goods on account of a defect.

The donor's re-possession of the gift is not requisite to the validity of retraction.

If the substance of a gift prove the property of another after it has been destroyed, and the donee make good the loss to the proprietor, in that case he is not entitled to receive any thing in compensation

The donee, incurring any responsibility in consequence of a

gift, receives
no compensa-
tion from the
donor.

from the donor; because a gift is a gratuitous contract, and a donee has no right to the security or safety of the gift, nor is he entitled to act in behalf of the donor.—Hence he is not entitled to any thing from the donor, notwithstanding the fraud that has been practised upon him; for although fraud be a cause of a rescission in a contract of *mutual exchange*, it is not so in a contract *not* of mutual exchange.

A mutual
gift requires
mutual seizin.

If a person give something to another on condition of that other giving something to him in exchange for it, the mutual seizin of the respective returns is regarded; that is to say, the contract is nothing until the two seizins take place, and is made null by the subject of it, on either side, being mixed with other property.—The reason of this is, that a deed of this nature is in its original a *gift*; but whenever the two seizins take place, it becomes, in effect, a *sale*; and, as such, a return may be made on account of a defect, or from an option of inspection; and the right of *Shaffa* is also connected with it.—*Ziffer* and *Shafëi* maintain that this is a sale both originally and ultimately, in as much as the characteristic of sale, namely, *a conveyance of property for a return*, exists in it; and in all contracts regard must be paid to the *spirit* of them, inasmuch that if a master should sell his own slave to the slave himself, he [the slave] is in that case free.—The arguments of our doctors are, that the contract comprehends two different shapes or descriptions.—I. It is a *gift* with respect to the *letter*.—II. It is a *sale* with respect to the *spirit*. It is therefore requisite to pay attention to both in the utmost possible degree. Now, in the deed at present under consideration, an observance of both is practicable; because, in a *gift*, the right of property is suspended till seizin; and, in a *sale*, the right of property is undone in case of any invalidity. The effect of sale, moreover, is obligation: and a gift also becomes obligatory upon giving a return for it.—Out of attention, therefore, to both shapes, the contract is considered as being originally a gift, and ultimately a sale. It is otherwise with respect to the sale of the

the person of a slave to the slave himself; for it is impossible in any respect to consider this as a sale, since a slave cannot possibly be master of himself.

SECTION.

If a person make a gift to another of a female slave, and except the child in her womb, the gift is valid;—but the exception is null; because an exception is never valid unless it relate to such a thing as might have been the subject of the deed; and a child in the womb cannot be the subject of gift, because it is equivalent to a constituent part, like the members of the body, as has been already shewn in treating of sale:—such, therefore, being the case, the exception is in effect the same as an invalid condition: hence the gift remains in force; and the exception is null.—The same rule also holds in cases of marriage, *Khoola*, and composition for wilful bloodshed;—that is to say, if a person assign a female slave (for instance) as the dower, in marriage, or as the consideration for *Khoola*, or the composition for wilful bloodshed, and except the child in her womb, the deed is valid, but the exception is null; because none of these contracts are invalidated by the insertion of an invalid condition.—It is otherwise in cases of sale, lease, or pawnage; for these are all rendered invalid by involving an invalid condition.

The gift of a pregnant slave includes a gift of her fetus.

If a master emancipate the fetus in the womb of his female slave, and afterwards make a gift of the slave to some person, it is valid; because as the fetus is not, in this instance, the property of the donor, it therefore is not dependant on the gift, in the manner that an exception is.

unless that have been previously emancipated.

If the foetus have been previously created a *Modabbir* the gift is null.

If a master create the foetus in the womb of his female slave a *Modabbir*, and afterwards make a gift of the slave to some person, the gift is not valid; because the child of the said slave still remains his property, and therefore his act of making it *Modabbir* does not resemble an *exception*, but rather operates as a total bar to the legality of the gift: for as it is impossible to render the gift valid with respect to the child, because of his being a *Modabbir*, it becomes the same as the gift of an undivided portion, or as the gift of a thing involved with the property of the donor.

The gift of a thing renders all provisional conditions respecting it nugatory.

If a person make a gift of his female slave to another, on condition that he restore her to him, or that he emancipate her, or create her an *Am-Walid*,—or, if a person make a gift of a *house* to another, on condition that the donee give back a *part* of it,—or, if a person make a gift of his house in charity to another, on condition that the receiver of the charity give him something in exchange for part of the house,—such gift or charity is valid; but the condition annexed is invalid, because it is contrary to the spirit or intendment of the contract; and neither gifts nor charities are affected by being accompanied with an invalid condition, because the prophet approved of *Amrees* [gifts for life,] but held the condition annexed to them by the granter* to be void.—It is otherwise in *sale*; because the prophet has prohibited sale with an invalid condition; and also because invalid conditions, as being in the nature of usury, manifest their effects in contracts of exchange, but not in such as are not of the description of exchange.

The gift of a debt, by a conditional exemption from it, is null.

If a person, having a debt due to him of one thousand *dirms*, should say to the debtor “when to-morrow arrives the said thousand *dirms* are your property,”—or, “you are exempted from the debt,”—or, if he should say “whenever you pay me one *half* of the said thousand the other half is *your property*,” or “you are ex-

* Namely, the condition of restoration upon the demise of the grantee.

“empted”

“*empted* from the debt of the other half,”—the gift so made is null. The reason of this is that the gift of a debt to a debtor is an *exemption*: but an exemption has two meanings:—I. It is a *conveyance of property*, on the principle of debts being property, on which account lawyers have held that “an exemption may be undone by a rejection:”—II. It is an *annulment*, since debt is in the nature of a quality, on which account an exemption does not rest upon acceptance.—Now nothing can be suspended on a condition excepting an *utter annulment*, such as a divorce or an emancipation;—and an exemption (as has been already said) is not an *utter annulment*, and therefore cannot be suspended on a condition, but on the contrary is perfectly nugatory.

AN *Amree*, or life-grant, is lawful to the grantee during his life, and descends to his heirs, because of the tradition before quoted.—Besides, the meaning of *Amree* is a gift of a *house* (for example) during the life of the donee, on condition of its being returned upon his death.—The conveyance of the house, therefore, is valid without any return; and the condition annexed is null, because the prophet has sanctioned the gift, in this instance, and annulled the condition, as before mentioned. An *Amree*, moreover, is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonstrated.

Case of life-grants.

If one person say to another, “my house is yours by way of *Rikba*,” it is null, according to *Haneefa* and *Mohammed*. *Aboo Yoosaf* has said that it is valid, because his declaration “my house is *yours*,” is a *conveyance* of the house: and the condition of *Rikba* is invalid; because the meaning of this phrase is “if I die before you then my house is yours,”—that is to say, he waits in expectation of the other’s death, that the house may revert to himself:—*Rikba*, therefore, resembles *Amree*.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—FIRST, the prophet has legalized *Amree* and annulled *Rikba*.—SECONDLY, the meaning of “my house

“ is

“is yours by way of *Rikba*,” is, “if I die before you, my house is yours,” which is a suspension of the conveyance of property upon the decease of the donor previous to that of the donee: and this is a matter of doubt and uncertainty, and consequently null.—It is to be observed that *Rikba* is derived from *Irtikáb*, which means *expectation*; for the donor is, as it were, an *expectant* of the death of the donee.

SECTION.

Of SADKA, or ALMS-DEED.

Alms-deed
requires seizure
of the subject,

ALMS-DEED, like gift, is not valid unless attended with seizure, as it is gratuitous, in the same manner as a gift. Neither is an alms lawful, where it consists of an undivided part of a thing capable of division, for the reasons already explained in the case of a gift under these circumstances.

and cannot
be retracted.

RETRACTATION of alms is not lawful; because the object, in alms, is *merit in the sight of God*, and that has been obtained. If, also, a person bestow alms upon a *rich* man it is not lawful to retract therefrom, on a favourable construction of the law, because to acquire merit in the sight of God may sometimes be the object in bestowing alms upon the rich.—In the same manner also, if a person make a *gift* of any thing to a poor man, it is not lawful to retract it, because the object in such gift is *merit*, and that has been obtained.

Distinction
between vo-
litive vows of
Mál and *Milk*,
in alms.

If a person vow to devote his *property* [*Mál*] in charity, let him give of that kind on which it is incumbent upon him to pay *Zakát*.—If, on the other hand, he vow to devote his *possessions* [*Milk*,] he must give the *whole* of his property.—It is related that there is no difference between these two cases.—We have, however, in treating of
the

the duties of the *Kâzee*, shewn the difference between *Mâl* and *Milk*; and also the principles on which both these traditions proceed.—It is to be observed that, in this case, the person that made the vow must be told to reserve for himself and his family as much of his property as may suffice for their maintenance until he be able to acquire more. The remainder, after such reservation, must be bestowed in charity; and after he has acquired more, he must then give in charity a portion equal to what he had reserved for the subsistence of himself and his family.—An explanation of this has already been given in treating of inheritance, under the head of *duties of the KÂZEE*.

BOOK XXXI

OF THE HIRE

HEDAYA

H E D À R A.

B O O K XXXI.

Of IḤĀRĀ, or HIRE.

Definition of
the terms
used in hire.

IḤĀRĀ, in its primitive sense, signifies a sale of usufruct; namely, a sale of certain usufruct for a certain hire, such as *rent* or *wages*. In the language of the LAW it signifies a contract of usufruct for a return.—(Analogy is repugnant to the validity of hire, as the thing contracted for, namely, the usufruct, is a non-entity; and the referring an investiture to a thing which is *forthcoming* is invalid.—The contract in question is however valid; because mankind stand in need of such contracts; and also, because the prophet has said, “*Pay the hireling his wages before the sweat has dried from his brow;*” and also, “*If a person hire another, let him inform him of the wages he is*

“to receive.”—The hirer or the lessee is termed *Ajir*, or *Mawjir*; and the lessor, or the person who receives the wages or rent, is denominated the *Moostàjir*.

- Chap. I. Introductory.
- Chap. II. Of the Time when the Hire may be claimed.
- Chap. III. Of Things the Hire of which is unlawful or otherwise;—and of disputed Hire.
- Chap. IV. Of invalid Hire.
- Chap. V. Of the responsibility of a Hireling.
- Chap. VI. Of Hire on one of two Conditions.
- Chap. VII. Of the Hire of Slaves.
- Chap. VIII. Of Disputes between the Hirer and the Hireling*.
- Chap. IX. Of the Dissolution of Hire.

C H A P. I.

A CONTRACT of hire is not valid unless both the usufruct and the hire† be particularly known and specified, because of the saying of the prophet, “If a person hire another, let him inform him of the wages he is to receive.”

The usufruct and the hire must be particularly specified.

* The former of these terms is remarkably ambiguous in our language. It sometimes serves to express the person who lets to hire, as we speak of a man who hires horses. For the sake of accuracy, however, the translator has uniformly, in this treatise, employed the word “hirer,” to express the person who engages the service of another, or the use of any article, as we commonly mean when we speak of a person who hires a servant, &c.

† Arab. *Ujará*; meaning the wages, rent, recompence, &c. according to the subject to which it applies.

OBJECTION.—It would appear, from that saying, that a knowledge of the *hire* alone is requisite, not a knowledge of the *usufruct*.

REPLY.—The usufruct is the subject of the contract, and the hire the thing contracted for.—Now the *subject* is the principal in a contract, and the thing contracted for the dependant: as therefore a knowledge of the *dependant* (namely the hire) is requisite, it follows that a knowledge of the *principal* is requisite *a fortiori*:—consequently a knowledge of the *usufruct* is established, from the tradition in question, by inference;—and also, because ignorance with respect to the subject of the contract, and the return, tends to excite contention, in the same manner as ignorance with respect to the price and the article in a contract of sale.

The hire (or recompence) may consist of any thing capable of being price.

WHATEVER is lawful as a price, is also lawful as a recompence in hire; because the recompence is a price paid for the usufruct, and is therefore analogous to the price of an article purchased.—All articles, moreover, which are incapable of constituting price, (like things not of the description of *similars*, such as a slave, or cloth,) are nevertheless a fit recompence in hire, since those constitute *a return consisting of* PROPERTY.

The extent of the usufruct may be defined by fixing a term,

THE extent of usufruct may be defined by fixing a term; as in the hire of a house for the purpose of residence, or the hire of land for the purpose of cultivation.—A contract of hire, therefore, stipulated for a certain term, to whatever extent, is valid; because, upon the term being known, the extent of the usufruct for that term is also known. This proceeds on a supposition of the use not being various.—Where, however, the uses to which the article is to be applied are various, the usufruct cannot be ascertained by the mere declaration of a term; as in the case, for instance, of hiring ground, for a certain term, for the purpose of cultivation, which contract is invalid unless it express the particular species of cultivation, since some modes of tillage are injurious

rious to the land, and others are not so.—It is to be observed that the expression of our author “for whatever term,” denotes that hire is valid, whether it be for a long or a short term, as the term is ascertained, and men, moreover, frequently require a long term. If, however, the *Mootwalee* [procurator] of a charitable appropriation let out the appropriated article, the hire of it for any long term is made unlawful, lest the lessee might be enabled to advance a claim of right to it.—Hire for a long term, signifies for any term beyond three years. This is approved.

USUFRUCT may also be ascertained by a specification of work, as where a person hires another to dye or sew cloth for him, or an animal for the purpose of carrying a certain burden, or of riding upon it a certain distance,—because, upon shewing the cloth, and mentioning a particular colour, and the degree of the dying (such as dipping once or twice, for instance) in the first case,—or explaining the nature of the needlework (such as whether it is to be after the *Persian* or *Turkish* fashion) in the second case,—or explaining the weight and nature of the load in the third case,—or the length of the journey in the fourth case,—the usufruct is fully ascertained; and the contract is consequently valid.—It moreover frequently happens that a contract of hire is a contract for work, as in the case of hiring a fuller or a taylor, where it is requisite that the work be particularly specified. It is also sometimes a contract for usufruct, as in the case of hiring a domestic servant; and in this case a specification of the term is requisite.

or (in hiring servants, &c.) by specifying the work to be performed.

USUFRUCT may also be ascertained by specification and pointed reference; as where a person hires another to carry such a particular load to such a particular place; because, upon seeing the load and the place to which it is to be carried, the service to be performed is precisely ascertained; and the contract is consequently valid.

or by specification and pointed reference.

CHAP. II.

Of the Time when the Hire may be claimed.

Hire can only be claimed in virtue of an agreement, or in consequence of the end of the contract being obtained.

HIRE is not due immediately on concluding the contract, but becomes claimable on one of three grounds; for it is claimable in *advance*, in virtue of a previous agreement,—or in advance, independent of such agreement,—or, in consequence of the hirer obtaining the thing contracted for*. *Shafēi* maintains that it becomes a property immediately upon the conclusion of the contract; because a non-existent usufruct is accounted existent from the necessity of giving validity to the contract; and consequently the effect (which is *right of property*) is established with respect to the thing opposed to the usufruct, namely, the consideration or recompence.—The argument of our doctors is that a contract of hire is renewed every instant according to the occurrence of the usufruct, as has been already explained.—Now the contract in question is a contract of exchange, which requires that the consideration and the return be equal. Hence, because of the unavoidable delay attending the usufruct, there must also be a delay with respect to the return for it, namely, the hire; but upon the usufruct being obtained, a right of property takes place with respect to the hire, in order that equality may be established;—and so also, where it is stipulated that the hire shall be in advance, or where it is paid in advance; because equality was required on account of the right of the hirer, who, in this instance, foregoes his right.

The tenant becomes bound for the

UPON a tenant taking possession of a house he becomes bound for the rent, although he should not reside therein; because as it is im-

* Namely, the *usufruct*, *work*, or so forth.

possible to make delivery of the *usufruct*, the delivery of the subject from which the usufruct is derived is a substitute for it; since in delivering the article an ability to enjoy the usufruct is established.—If, therefore, any person were to usurp the house from the tenant, he [the tenant] is no longer responsible for the rent; because a delivery of the *article* was admitted to be a substitute for a delivery of the *usufruct* only, as this enabled the tenant to enjoy the usufruct; but when the one no longer remains, the other ceases of course; and as the contract is thereby broken, the rent consequently ceases.—If, also, a person usurp the house at any time before the expiration of the term of the lease, the rent drops in proportion, since the contract is broken in that proportion.

rent by a delivery of the house, &c. to him, so long as it is not *usurped* from him.

If a person hire a house, the lessor is at liberty to demand the rent from the tenant from day to day, because the object was *daily use*, and that has been obtained: the lessor may therefore insist upon his rent from day to day, unless the time for claiming the rent be specified in the contract, as if that were to express that “the rent shall be paid at such a time,”—or, “at the expiration of such a month,”—since this amounts to a stipulation of ready payment.—The same rule also obtains with respect to a lease of land, for the same reason.—In the same manner also, if a person hire a camel to *Mecca* (for instance,) the owner is at liberty to insist upon the hire stage by stage, because the object was *to travel by stages*.—What is here advanced is an opinion which was subsequently adopted by *Haneefa*. He was at first of opinion that the rent is not due, in the former instance, until the expiration of the term; nor the hire, in the latter, until the end of the journey; (and such is the doctrine of *Ziffer*;) because, as the object of the contract is the *whole* of the usufruct within the time or journey specified, it follows that the hire cannot be separately applied to separate portions of it;—in the same manner as where the object of the contract is *labour*, by a person hiring a *taylor* (for instance) to sew his garment.—The reason for the last opinion of *Haneefa* is that analogy

If it be not otherwise specified in the contract, rent may be demanded from day to day;

or the hire of an animal (upon a journey) from stage to stage.

analogy requires that the hire be demanded from instant to instant, in order that equality may be established. If, however, the demand were admitted every instant, it would follow that the hirer or lessee would be perpetually employed in paying the hire, without leisure to attend to any thing else, which would be highly inconvenient and injurious to him.—For this reason, therefore, the proportion is determined at the rate of *one day*, in the hire of a house or land,—and at *one stage*, in the hire of a quadruped.

A workman
is not entitled
to any thing
until his
work be
finished.

A WORKMAN is not at liberty to demand his hire until his work be finished, unless an advance of payment were stipulated; because some of the work still remains unobtained, whence he is not entitled to his hire.—The same rule also holds if the workman perform his business in the house of his employer; for in this instance he is not entitled to his hire before his work is finished, since some of his work still remains unobtained, as has been mentioned above.—This is what occurs in the *Hedaya* upon this subject; and the same is also to be found in the *Tijreed*.—The compiler of the *Mabeet* and *Kadooree* likewise mention the same.—It is, however, contrary to the *Mabsoot*, for there it is mentioned that “hire is due in proportion to labour;” and *Timoor Tashee*, and others, have thus expounded the LAW in this particular.—Concerning this case, therefore, there are two opinions, as is mentioned in the *Jama Ramooz*.—If an advance of hire be stipulated in the agreement, the workman is in such case at liberty to require his pay before his work be finished, as a stipulation of this nature, in a contract of hire, is binding.

Case of a
baker hired
to bake
bread;

IF a person hire a baker to bake bread in his [the hirer's] house, at the rate of one *Kafeez* of flour for a *dirm*, the baker so hired is not entitled to his wages until he draw the bread out of the oven, since until this be done his work is not compleated. If, therefore, the bread be burnt, or fall out of his hands, and thus be spoiled, he is not entitled to his hire, because of the destruction of the bread before de-

livery

livery of it to the hirer.—If, on the other hand, he draw the bread out of the oven, and it be afterwards burnt or otherwise destroyed, without his act, he is entitled to his hire, because he has made a due delivery of it to the hirer, in virtue of having deposited it in his house: neither is he, in this instance, liable to make any compensation, as he has not been guilty of any transgression.—The compiler of the *Hedaya* remarks that this is according to *Haneefa*, proceeding on the idea that the bread is a trust in the baker's hands:—but that the two disciples maintain that the hirer has it in his option to exact a compensation for the value of the *flour* only; and that in this case he is not to pay the baker any part of his hire, since (as they hold) the bread is *insured* with the baker, whence he is not exempted from responsibility until he duly deliver it to the hirer;—or, if he please, he may exact a compensation for the bread, paying the hire for the baking.

IF a person hire a cook to prepare an entertainment, he [the cook] must also dish the meat, as this is customary. and of a cook;

IF a person hire another to make him a certain quantity of bricks, he [the brickmaker] is entitled to his hire when he sets up the bricks*, according to *Haneefa*.—The two disciples hold that he is not entitled to his hire until he collect the bricks together and build them up, because it is this which completes his work, since bricks are not secured from injury until they be so collected and built up:—the collecting them together, therefore, is analogous to drawing bread out of the oven.—Besides, this is what is always customary with persons hired for such work; and custom is regarded in every matter concerning which we have no express ordinance.—The argument of *Haneefa* is and of a brickmaker.

* The case here considered has a reference to the various stages of brick-making, and relates merely to *sun-dried* bricks, the *burning* being a different trade.—The bricks are first molded; then, when *half* dried, set up on end; and when *completely* dried, built into stacks for use.

that

that the work is completely finished by setting up the bricks, the collecting them together and stacking them being an extra business, in the same manner as removal from one place to another; and accordingly people take bricks, to build with, from the place where they have been set up, without waiting for the *stacking* of them.—It is otherwise *before* they are set up, since the clay is not then hardened: and it is also otherwise with bread, as the use of that cannot be obtained until it be drawn out of the oven.

The article wrought upon may be detained by the workman until he be paid his hire;

and he is not responsible, in case of accidents, during such detention.

EVERY artificer whose work produces a visible effect upon an article (such as a *dyer* or *fuller*) is at liberty to detain such article until he receive his hire; because in this instance the subject of the contract is descriptively existent in the article, whence he is allowed to detain it with a view to receiving the return for such subject, in the same manner as if it were an article of sale;—in other words, as the seller is allowed to detain the article sold until he receive the price, so also in the case in question.—If, therefore, a dyer or fuller detain cloth for the purpose of being paid his hire, and the cloth perish in his hands, he is not responsible, according to *Haneefa*, inasmuch as he has not transgressed in so detaining it, the cloth remaining as a deposit with him after detention, in the same manner as before.—He is not, however, in this case entitled to any hire, because of the subject of the contract perishing before delivery.—The two disciples hold that the cloth is a subject of responsibility *before* detention, and so also *after* detention; but, that the owner of the cloth has it at his option either to take a compensation for the value of the cloth as it stood before the fulling or dying,—in which case the workman is not entitled to any pay,—or to take a compensation for the value of it as it stood after the work,—in which case the workman is entitled to his hire.—This shall be more fully explained hereafter.

If the work be of a nature not to

A WORKMAN, the effect of whose labour is not visibly extant in an article, (such as a *boatman*, or a *porter*,) is not at liberty to detain the

the article with a view to receiving the hire; because, in this instance, the subject of the contract is merely *labour*, which is in no manner existent in the article conveyed or carried:—and the *washing* or *bleaching* of cloth is analogous to the *portage* of it in this particular. From this analogy in regard to *washing* or *bleaching* it may be inferred that the term *fuller* [*Kissār*] in the preceding example, applies solely to one who uses starch, or such other material; but, that where such a person, in cleansing cloth, makes use of things of no estimable value, such as *water* and *sunshine*, he has not right of detention, since in such case nothing remains that can be termed an effect from his labour, the whiteness being an original quality inherent in the cloth. *Kāzee Khan* says, that if a fuller wash cloth, and an effect be produced from his work by means of *starch* (for instance,) he has a right of detention; but that if he merely whiten the cloth, there is in that case a difference of opinion. The approved doctrine, however, is that he has a right of detention in either case, because the whiteness was a quality concealed in the cloth, and brought forth by his labour. This is different from the case of a *fugitive slave*; for the restorer is entitled to detain a *fugitive slave* with a view to his reward, notwithstanding there be no visible effect produced in the slave; the reason of which is, that the slave was in danger of being altogether lost, and was preserved only by the restorer bringing him back; whence he may be said to *sell* the slave to his owner, and consequently, that he has a right of detention. What is here advanced is according to our three doctors. *Ziffer* maintains that a workman possesses no right of detention in either case; that is, whether the effect be existent in the article, or otherwise;—because, where his work is attended with an effect existent in the article he has already made a delivery of the same to the hirer, as having blended it with his property; and a right of detention necessarily ceases upon delivery. Our doctors, on the other hand, argue that the workman, in blending the effect of his work with the hirer's property, has acted merely from necessity, since unless he were so to do it would be impossible to perform the work.

produce any
visible effect
in the article,
it cannot be
detained.

This implication, therefore, does not infer that the workman intends or designs a delivery; and hence his right to detention does not cease; in the same manner as where, in a sale, the purchaser takes possession of the merchandise without the seller's consent; in which case the seller's right of detention with a view to receiving the price, does not cease; and so also in the case in question.

A workman, if the contract be restricted to his work, cannot employ any other person.

If the hirer stipulate with the workman that he shall himself perform the work, he [the workman] is not at liberty to employ any other person; because the subject of the contract is the work of *this* person and not of any *other*, and therefore the right of the hirer is connected with *his* work in particular, in the same manner as the right of the person who hires a place or an article is connected with the use of that particular place or article. If, on the other hand, the work be absolute, without any stipulation that the workman shall *himself* perform it, (as if a person were to say to a taylor "Make up this garment") the workman is at liberty to hire any other person to perform the work, as the right of the hirer, in this instance, is merely to *taylor's work*, which may be performed either by this or by any other taylor; in the same manner as the payment of a debt, which may be made either by the debtor himself, or by any other person.

SECTION.

Cases in which (from an unavoidable accident) the contract cannot be completely fulfilled.

If a person hire another to go to *Basra*, and bring his family thence, and this person accordingly go to *Basra*, and there find some of the family dead, and bring away the remainder, he is entitled to his whole hire for the journey to *Basra*, and to a hire for returning back in proportion to the number he brings with him; because, as he

he has performed a *part* of his contract, and not the *whole*, it follows that he is entitled to an equivalent for what he performs, and that his right is annulled in proportion to what he does not perform. The compiler of the *Hedaya* remarks that this proceeds upon a supposition of the number of the family being previously ascertained, so as to oppose the hire agreed upon to the whole; for otherwise the whole hire is due. This rule, moreover, obtains only where the expences of the remainder are materially lessened by the death of some; for if the expence of the whole be not thereby diminished, (as where those who died were not grown up, but yet able to travel on foot,) the person in question is still entitled to his whole hire.

If a person hire another to carry a letter to *Basra* and bring back an answer, and he accordingly go to *Basra*, and there find the person dead, to whom the letter is addressed, and come back and return the letter, he is not entitled to any wages whatever. This is according to the two disciples. *Mohammed* maintains, that he is to receive the usual hire for going to *Basra*, since in so doing he has performed a part of the contract, namely, the journey; the reason of which is that the hire or recompence is in lieu of the *journey*, as it is *that* which is attended with labour, not the carriage of the letter. The argument of the two disciples is, that the carriage of the letter is the thing contracted for; either because that is the design, (the letter being intended as a compliment to the person to whom it is addressed,) or because the carriage of the letter is a means of accomplishing the design of it, namely, a communication of its contents. The title to wages, therefore, depends upon the carriage of the letter: but, upon the messenger returning the letter, the contract is broken, and his claim to wages consequently ceases;—in the same manner as in the next following example concerning wheat. If, however, in the case in question, the messenger leave the letter at *Basra*, and return, he is entitled to a hire for the journey thither, according to all our doctors,

since what was contracted for has been in part performed in this instance.

If a person hire another to carry wheat to a certain person at *Bafra*, and he accordingly carry the wheat to *Bafra*, and then find the person dead to whom it was consigned, and he bring back and return the wheat to the hirer, he is not entitled to any thing whatever, according to all our doctors, as he has failed in the performance of what he had contracted for. It is otherwise (according to *Mohammed*) in the case of the *letter*, because in that case (agreeably to his tenets) the *journey* was the thing contracted for, as has been already explained.

C H A P. III.

Of Things the Hire of which is unlawful or otherwise; and of disputed Hire.

A house or shop may be hired without specifying the particular business to be carried on in it,

unless it be of a nature injurious to the building.

It is lawful to hire a house or shop for the purpose of residence, although no mention be made of the business to be followed in it; because, as the ostensible purpose to which it is to be applied is *residence*, this must be taken for granted; and residence does not admit of various descriptions. The contract in question is therefore valid; and the lessee is at liberty to carry on in the place any business he pleases, as the case is absolute. A blacksmith, however, or a fuller or miller must not reside in the house, as this would be evidently injurious, since the exercise of those trades would shake the building. Although, therefore, the contract in question be absolute, still it is virtually restricted to what may not be injurious to the building.

It

It is lawful to hire land for the purpose of cultivation, as this is the use to which land is commonly applied. In this case also, the hirer is entitled to the use of the road leading to the land, and likewise to the water (that is, to his turn of watering) although no mention of these be made in the contract; because land is hired with a view to the use of it, which cannot be obtained without a right to road and water:—both are therefore included, although no mention of them be made at the time of concluding the contract:—in opposition to a case of *sale*; for in that instance a right to road and water is not included unless particularly specified, the end of sale being *appropriation*, not *present use*; whence it is that it is lawful to *sell* an ass's colt, or saltpetre grounds, but not to *hire* them.

In a lease of land, the renter is entitled to the use of road and water:

A LEASE of land is not valid unless mention be made of the article to be raised in it; because land is hired, not only with a view to cultivation, but also for other purposes, such as building, and so forth; moreover, the articles sown in the land may be of different qualities, since some vegetables come quickly to maturity, whilst others are flower of growth. It is therefore requisite that the article be specified, to avoid disputes between the lessor and lessee; or, that the lessor declare “I let the land on this condition, that the lessee shall raise whatever he pleases in it,” in which case, as the lessor expressly leaves the lessee at full liberty, the uncertainty which might occasion a dispute is removed.

but the lease is not valid, unless the use to which it is to be applied be specified.

If a person hire unoccupied land, for the purpose of building or planting, it is lawful, since these are purposes to which land is applied. Afterwards, however, upon the term of the lease expiring, it is incumbent on the lessee to remove his buildings or trees, and to restore the land to the lessor in such a state as may leave him no claim upon it, because houses or trees have no specific limit of existence, and if they were left upon the land it might be injurious to the proprietor. It is otherwise where land is hired for the purpose of tillage,

At the expiration of the lease, the land must be restored in its original state.

and

and the term of the lease expires at a time when the grain is yet unripe; for in such case the grain must be suffered to remain upon the land, at a proportionable rent, until it be fit for reaping, because, as the time *that* may require is limited and ascertainable, it is possible to attend to the right of both parties. In the case, on the contrary, of trees or buildings, it is impossible to pay attention to the right of both parties; and it is therefore incumbent on the lessee to remove his trees or houses from the land;—unless the proprietor of the soil agree to pay him an equivalent, in which case the right of property in them devolves to him; (still, however, this cannot be, without the consent of the owner of the houses or trees; except where the land is liable to sustain an injury from the removal, in which case the proprietor of the land is at liberty to give an equivalent, and appropriate the trees or houses without the lessee's consent;)—or unless the proprietor of the land assent to the trees or houses remaining there, in which case they continue to appertain to the lessee, and the land to the landlord; for as the right of removing them belongs to the landlord, he is at liberty to forego that right. It is written in the *Jama Sagheer* that if the term of the lease be expired, and the land be occupied by pulse or other garden stuffs, those must be removed; because as those have no fixed term of existence, they are therefore analogous to trees.

An *absolute* contract leaves the hirer at liberty to give the use to any person:

THE hire of an animal is lawful, either for carriage or for riding, as to those uses animals are applied. If, therefore, the riding be absolutely expressed, the hirer is at liberty to permit any person he pleases to ride upon the animal, because of the riding being contracted for in an *absolute* manner. Upon the hirer, however, either mounting the animal himself, or admitting another to ride on it, he is not at liberty to set any person on it besides, because the actual object of the contract is then ascertained and determined. Men, moreover, differ in their mode of riding, whence it in fact becomes the same as if the particulars of the riding had been expressly stipulated in the contract.

contract. In the same manner also, if a person hire a dress for the purpose of wearing it unrestrictedly, and in an absolute manner, he is at liberty either to wear it himself, or to give it to any other person to wear: but upon putting it on himself, or permitting another so to do, he is not at liberty to clothe any one in it besides.

If a person let a quadruped to hire, on condition that a particular person shall ride upon it, or let a dress to hire, on condition that a particular person shall wear it,—and the hirer set upon the quadruped some other than the person specified, or give the dress to some other person to wear, and the quadruped or dress be destroyed, he [the hirer] is responsible; because, as men differ in their manner of riding, and of wearing clothes, the specification of a particular person is valid, and consequently it is not lawful for the hirer to swerve therefrom. The same rule also obtains with respect to every thing liable to be differently affected by a different occupant: in other words, if the person who lets to hire restrict the use, it is restricted accordingly; and if the hirer swerve therefrom, he is responsible in case of the destruction of the article, for the reason above stated. *Land*, however, and every other article not liable to be differently affected by a different occupant, (such as a *tent* or *pavillion*,) is not restricted in point of use by the mention of a particular person; and consequently, the hirer is at liberty to put any one to reside in it that he pleases, since the exclusive restriction is of use only because of its preventing a difference of effect. But the residence of persons whose business is of injurious tendency to a building, (such as *blacksmiths*, and so forth) is always excepted from the contract, as was before explained.

If a person hire an animal to carry a burden, and the person who lets it to hire specify the nature and quantity of the article with which the hirer is to load the animal,—as if he were to say, for instance, “You shall load it with five *Kaseezs* of *wheat*,”—the hirer is in this case at liberty to load the animal with an equal quantity of
any

but in a restricted contract, any deviation with respect to the use renders the hirer responsible for the article hired,

unless that be of a nature not liable to injury from such deviation,

or, unless the deviation be not of a nature to injure the article.

any article not more troublesome or prejudicial in the carriage than wheat, such as barley, or rape-feed, as all articles of that description are included in the permission contained in the contract, because of their not occasioning any difference, or because they may be even preferable to what was specified in it, as being less prejudicial. The hirer, however, is not at liberty to load the animal with any article of a more prejudicial nature, in the carriage, than wheat, (such as *salt*, for instance,) since to this the lessor had not assented.

If a person hire an animal to carry a certain quantity of cotton, he is not at liberty to load the animal with a similar quantity of iron, since it is highly probable that the carriage of the *iron* may be more prejudicial to the animal than the carriage of the *cotton*, for this reason, that the iron presses chiefly on one spot of the creature's back, whereas the cotton presses on it equally in all parts.

An excess in the use induces a proportionable responsibility in case of accident.

If a person hire an animal to carry a certain quantity of wheat, and load it with a greater quantity, and the animal perish, he is responsible in the proportion of the excess load. Thus a person, for instance, hires an animal to carry ten *Kafeezs* of wheat, and loads him with fifteen *Kafeezs*, and the animal perishes:—in which case he is responsible for one third of the value of the animal. The reason of this is that the animal in question has perished in consequence both of what has been permitted to the hirer, and also, of what has not been permitted; as, therefore, the destruction has been occasioned by the *whole burden*, it is divided between both parts respectively; and accordingly, nothing is accounted upon the proportion allowed, but an indemnification is due upon the proportion *unallowed*. If, however, the hirer had overloaded the animal to a degree beyond what it was able to bear, he is, in this case, responsible for the *whole* of the value, since he was utterly unauthorised to act thus, as it is altogether unusual to do so.

If a person hire an animal for his own riding, and he take up another person behind him upon the animal, and the animal perish, he is responsible for one half of the value.—No regard is paid to the *load* in this instance, because a person who does not understand riding will hurt an animal's back, although he be of light weight, as, on the contrary, a complete rider sits light on horseback, although his person be heavy.—Besides, a man is not an article of weight, whence his weight cannot be ascertained; and accordingly regard must be paid to the *number* of the riders, in the same manner as, in offences against the person, regard is paid to the number of the offenders;—in other words, if one person accidentally give another *ten* wounds, and a second person give him *one* wound, and the wounded person die, the fine of blood is due from both in equal shares.—What is here advanced proceeds on a supposition of the animal in question being capable of carrying double; for if it be incapable of carrying double, the hirer is responsible for the whole value, in the same manner as in the case of *wheat*.—It is also to be observed that, in the same manner as this rule applies to *adults*, so does it likewise to *infants* capable of riding alone upon an animal: but if the hirer place behind him an infant incapable of riding alone, it is the same as goods or effects, and he is, in such case, responsible only in proportion to the additional load.

A rider, taking up an additional rider, incurs responsibility for half the value of the animal.

If a person hire an animal for riding, and pull the halter, or beat the animal, so as to occasion its death, he is responsible for the whole value, according to *Haneefa*. The two disciples maintain that he is not responsible where he only pulls the halter or beats the animal in such a degree as is customary, since every thing customary is included in the contract, and therefore the case is the same as if he were to perform those acts by express permission of the owner, whence he is not responsible.—The argument of *Haneefa* is that the owner's permission is restricted to the condition of safety, since an animal may be driven without either pulling the halter or beating it, both of these being an

An hired animal perishing from ill usage subjects the hirer to responsibility.

excessive and unnecessary exertion: the use, therefore, is restricted to the condition of *safety*, in the same manner as the travelling upon the public highway.

In the hire or loan of animals, responsibility is induced by any deviation from the prescribed journey.

If a person hire an animal to carry him to a particular place, (*Medina*, for instance,) and he go out of his way, and proceed to another place, and then return with the animal to *Medina*, and it die, he is responsible for it. The same rule also holds with respect to an animal *lent*.—Some have said that this example proceeds upon a supposition of the animal being hired merely to go to *Medina*, (not to go and return,) in which case the hirer is not, in fact, required to restore it to the owner: but that where it is hired for the purpose both of *going* and *coming*, the hirer is in the same predicament with a trustee who first swerves from the terms of his trust, and afterwards accords to them, in which case he is not responsible for the deposit in his hands.—Others, again, say that the rule is absolute; and consequently that responsibility attaches in either case; for there is an essential difference between a hirer or borrower, and a trustee; because the trustee is directed to keep the deposit, independantly, and consequently the order for conservation still remains in force after the trustee ceases from his deviation and reconforms to the terms of trust, whence he reverts to his situation of representative of the owner; whereas, in a case of hire or loan, the hirer or borrower are directed to keep the article dependantly of the *use*, and not independantly; and consequently, upon the use ceasing, they no longer continue representatives of the owner; whence they are not discharged from responsibility by their return to *Medina*.—This is approved.

The change of a saddle for another of the same sort does not induce responsibility,

If a person hire an afs with its saddle, and fasten upon it another saddle, of the same sort as is commonly used upon such an afs, he is not responsible if the afs perish; because where the saddle is proportionate to the animal, the owner's assent extends to it, as the restriction is advantageous only in case of the other saddle being heavier than the

the one specified in the contract, when, if the ass were to perish, the hirer would be responsible in proportion to the difference.—If, on the contrary, the hirer were to fasten upon the ass a saddle of a sort not commonly used upon such an ass, he is responsible for the whole value; for as this is not included in the lessor's assent, it follows that the hirer, in so doing, acts contrary to engagement.

If a person hire an ass, with its saddle, and fasten upon the ass a pack-saddle, of a sort not commonly put upon such an ass, he is in this case responsible for the whole value of the animal, for the reason alleged in the example of the *saddle*; nay, the obligation rests upon him in this case, *a fortiori*, since a pack-saddle or panniers are not of the same nature as a *riding*-saddle, and are, moreover, heavier. If, also, he fasten upon the ass a pack-saddle of a sort commonly used upon such an ass, he is responsible for the whole value, according to *Haneefa*.—The two disciples allege that, in this instance, he is responsible only in proportion as the load of the pack-saddle exceeds that of the riding-saddle; because, where the pack-saddle is of a sort commonly put upon such an ass, it follows that the *riding*-saddle and the *pack*-saddle are equal, and consequently that the owner of the ass assents,—except the latter exceed the former in weight, in which case the hirer is responsible in proportion to the excess of weight, as to that the owner is not assenting.—The excess, therefore, in this instance, is analogous to a case where the person who lets out an animal to hire specifies the quantity of wheat he is to carry, and the hirer loads it with a larger quantity.—The argument of *Haneefa* is that a pack-saddle is not in the nature of a common saddle:—it is not so in *appearance*, since it is more spread upon the animal on one side than on the other*; nor is it so in *reality*, since a pack-saddle is for carrying burdens, whereas a common saddle is for riding.—The hirer, there-

unless the weight be different, when responsibility attaches in proportion to the excess.

If the nature of the saddle be different, responsibility attaches in toto.

* This alludes to the particular fashion of the *Palan*, or *Persian* pack-saddle, with which the translator is unacquainted.

fore, in fastening a pack-saddle upon the ass, acts contrary to his engagement with the owner, in the same manner as a person who hires an animal to carry *wheat*, and loads it with *iron*.

A porter is not made responsible, by any immaterial deviation from the prescribed road.

If a person hire a porter to carry a load of wheat to a certain place, by a particular road, and he take another frequented road, and the wheat be lost, he is not responsible; and if he carry the wheat safe to the place, he is entitled to his hire.—This proceeds upon the supposition that the roads are not widely different, for in this case the restriction to either in particular is useless.—Where, however, the roads are widely different, that taken by the porter being dangerous or round about, or of difficult passage, the porter is responsible in case of the wheat being lost, since the restriction is of use in this instance, and therefore valid.—It is to be observed that *Mohammed* does not make this distinction, but alleges that the porter is not responsible if he carry his load by any other than the road specified, provided it be one commonly used; because, where it is a beaten path, there is no apparent difference between the two.—If, on the contrary, he carry the load by an unfrequented road, and it be lost, he is responsible for the value, as the restriction is valid, and the porter acted contrary to his instructions.—If, however, in this case, he carry the wheat safe to the place, he is entitled to his hire; because upon so doing his deviation from his orders is rectified, and the end is obtained.

Any injurious deviation from the prescribed culture of hired land induces a proportionable responsibility.

If a person hire land for the cultivation of wheat, and sow therein trefoils or clover, he is responsible in proportion to the damage the land sustains, because the cultivation of any species of grass* is more injurious to the land than the cultivation of wheat, as those require more water, and their roots spread more in the ground.—In this instance,

* The term, in the original, is *Rāḥā*, which applies to all the more succulent species of field herbage.

therefore,

therefore, the lessee has acted contrary to his agreement with the lessor, inasmuch as he had done a thing more injurious to the land than what the lessor had specified.—But if the lessor require this compensation, he is not entitled to any rent, as the lessee in that case stands as an usurper, because of his acting contrary to engagement, as before explained.

If a person deliver a piece of cloth to a taylor, directing him to make it into a *Peeràbin*, or shirt, for a particular hire, and he make it into a *Kàbbá*, or short vest, the person has it in his option either to take a compensation from the taylor for his cloth, or to receive the *Kàbbá*, paying him an adequate hire, which, however, is not to exceed what had been at first agreed upon.—This is according to the *Zábir Rawáyat*.—Some have said that the *Peeràbin* is merely a *Kàbbá*, or vest, of one fold.—Others, again, say that the *Peeràbin* is not particularly restricted to a vest of one fold, as both are used indiscriminately at all seasons.—It is reported, from *Haneefa*, that the proprietor of the cloth is to take a compensation from the taylor, and that he has no option of any thing else; because, as the *Kàbbá* is a species of apparel totally different from the *Peeràbin*, the taylor stands in the predicament of an usurper.—The reason of the doctrine, as reported from the *Zábir Rawáyat*, is that the *Kàbbá* is in one shape a *Peeràbin*, as it is occasionally used instead of the *Peeràbin*, and in another view it is not so.—Hence there is both a similitude and a dissimilitude; and accordingly the proprietor of the cloth has it at his option to take a compensation for the value, (in which case the cloth becomes the property of the taylor,) or, to take the *Kàbbá*, paying an adequate hire:—an adequate hire only is due, because the taylor has not completely fulfilled his agreement; and it must not exceed what was at first agreed upon, as obtains in all cases of invalid hire.

A taylor is responsible for deviating from his orders.

If a person deliver a piece of cloth to a taylor, directing him to make it into a *Kàbbá*, and he make it into a *Shikwan*, or drawers, some

Some allege that the proprietor must accept a compensation; and that he has no other option, because of the different uses to which those two sorts of apparel are applied.—It is certain, however, that the proprietor has it at his option, in this instance, either to take a compensation for the value of his cloth, or to take the *Shilwar*, paying an adequate hire; because the use, namely clothing and covering nakedness, is the same in both; and the case is therefore analogous to where a person orders a brazier to “make him a dish of this brass,” and the brazier makes him a brazen plate, in which instance the proprietor of the brass has an option, and so also in the case in question.

CHAP. IV.

Of *invalid* Hire.

An invalid condition invalidates hire;

HIRE is rendered invalid by involving an invalid condition, in the same manner as sale, for hire stands in the place of sale, whence it is that a contract of hire may be dissolved in the same manner as a contract of sale.

but a *proportionate* hire is in such case due, to the extent of the hire specified.

IN a case of hire rendered invalid by involving an invalid condition, a *proportionate* hire is due where that does not exceed the hire specified in the contract,—in other words, of the specified hire and the proportionate hire, the smallest is due.—*Ziffer* maintains that a proportionate hire is due, to whatever amount it may extend; for he conceives an analogy between the case in question and a case

case of invalid sale, in which the *value* of the article is due; to whatever amount.—The argument of our doctors is that usufruct cannot be appreciated but by a contract entered into to answer the necessity of mankind, whence, in *valid* hire, the degree is measured by the necessity.—As, however, invalid hire is a dependant of a contract of valid hire, it has a relation to a valid contract, and consequently regard is paid in it to what may be the customary recompence in valid hire, which is a *proportionate* hire.—Now the parties, in a case of invalid hire, having agreed upon a specific amount, it follows that both, in making such specification, agree to remit whatever may be beyond the specified hire, where that is exceeded by the proportionate hire: in this case, therefore, the specified hire is due:—but if, on the other hand, the proportionate hire *fall short* of the specified hire, the excess of the specified hire is not due, as the specification itself was invalid.—It is otherwise in an invalid sale; for as an article of sale is appreciable to its extent, there is no necessity for a regard to the contract in order to manifest its value. Now this value is the *original* thing: if, therefore, the specification of a price be valid, (as in a case of valid sale) the effect passes from the original thing to the said price; but if, on the contrary, the specification of a price be invalid, (as in a case of invalid sale,) the effect does not pass from the original thing to the price.

If a person hire a house, on a condition thus expressed, that “he shall pay one *dirm* every month,” such contract is valid for one month, but invalid for every subsequent month, unless the whole of the months for which it is to be hired be specified, in which case it continues valid.—The arguments on which this is founded are drawn from the construction of the words in the *Arabic* idiom.—It is to be observed that as the contract in question is valid for one month only, it belongs to both the lessor and lessee, respectively, to dissolve the contract at the end of the month, as the *valid* contract is then complete and finished.—If, therefore, in this instance, the lessee, after the

A contract indefinitely expressed closes at the expiration of the first term.

the expiration of the said month, continue in the house for a single instant of the second, the contract remains in force for the second month, nor is the lessor at liberty to put out the lessee until the end of this month; (and the same rule holds with respect to every month in the beginning of which the lessee continues to occupy the house;) because the contract appears to be renewed, with the consent of both parties, in virtue of the lessee still continuing to occupy the house in the succeeding month.—This, however, proceeds merely upon analogy; and has been adopted by some of our modern doctors.—According to the *Zāhir Rawāyet*, an option of dissolution remains in the next month, to either party, to the end of the first day of the month; for in having regard to the very first *instant* only of that month, a restriction is induced so narrow as not to admit the exercise of an option.

Rules with
respect to an-
nual leases.

If a person hire a house for a year, at the rate of twelve *dirms*, it is lawful, although no mention be made of the rent of each month respectively; because, as the whole term of the lease is known without division, it is therefore the same as hiring for a single month, which is lawful, although no mention be made of the rent of each day respectively.—It is to be observed that if the day of the year's commencement be specified (as if the lessee were to say “I take this house, for a year, from the first of the month *Rājāb*,”) the lease commences from that date.—If, on the contrary, no date of commencement be specified, the lease commences from the date of the deed itself; because all dates are equal with respect to hire, and therefore a lease in this particular resembles a vow; in other words, if a person make a vow that “he will not *speak* (for instance) to a particular person for one month,” the observance of his vow commences upon the instant of expressing it, all dates being equal with respect to vows; and so also in the case in question.—It is also to be observed, that if, in this instance, the contract of hire be concluded on the first day of the month, all the succeeding months of the year are counted from

from the appearance of the new moon, as this is the original standard of calculation.—If, on the contrary, the contract be concluded after the lapse of some days from the commencement of a month, the lease is in that case for three hundred and sixty days, according to *Haneefa*; and there is one report from *Abou Yoosaf* to the same effect.—According to *Mohammed*, and another report of *Abou Yoosaf*, the first month is to be counted by days, to be completed from the next succeeding month; and the other months must be counted from the appearance of each new moon; because a calculation by the number of days is admitted purely from necessity, which exists in the first month only.—The argument of *Haneefa* is that upon the first month being completed by the deduction of a certain number of days from the second, that also must, from necessity, be counted by days; and so of the rest to the end of the year;—in the same manner as obtains with respect to the *Edit*;—that is to say, if a divorce take place in the middle of a month, it must be counted by days; and so also in the present instance.

KEEPERS of baths and cuppers are lawfully entitled to wages:—the former, because it is an invariable custom, among all *Mussulmans*, to pay them wages, and the prophet has said “*Whatever seems good unto the body of the MUSSULMANS is also good before God*”;—and the latter, because the prophet paid a recompence to a person who performed the operation of cupping upon him; and also, because this is a certain recompence for a certain service, and is therefore lawful.

Wages are due to keepers of baths and cuppers;

THERE are no wages for the covering of animals,—that is, for bringing a male to copulate with a female; because the prophet has said “*ASSIB-TEES is among the things prohibited*”; and by *Assib-tees* is understood the recompence for the copulation of a stallion, or so forth.

but there is no hire for the covering of mares, &c.

nor for the
performance
of any religi-
ous duty;

It is not lawful to accept a recompence for summoning the people to prayers, or for the performance of a pilgrimage, or of the duties of an *Imām*, or for teaching the KORAN, or the LAW; for it is a general rule, with our doctors, that no recompence can be received for the performance of any duty purely of a *religious* nature.—According to *Shafēi*, it is allowed to receive pay for the performance of any religious duty which is not required of the hireling in virtue of a divine ordinance, as this is only accepting a recompence for a certain service; and as the acts above described are not *ordained* upon the hireling, it is consequently lawful to receive a recompence for them.—The arguments of our doctors upon this point are twofold.—FIRST, the prophet has said, “*Read the KORAN, but do not receive any recompence for so doing:*” and he also directed *Othman-bin-Abeeyās*, that if he were appointed a *Māwzin* [a cryer to prayer] he should not take any wages. SECONDLY, where an act of piety is performed, it springs solely from the performer, (whence regard is had to *his* competency,) and consequently he is not entitled to any recompence from another, as in the cases of *fasting* or *prayer*.—A teacher of the KORAN, moreover, is incapable of instructing another in it, but by means of qualities existing in his scholar, namely capacity and docility, and therefore undertakes a thing the performance of which does not depend upon himself, which is consequently invalid.—Some of our modern doctors, however, hold it lawful to receive wages for teaching the KORAN in the present age, because an indifference has taken place with respect to religion, whence if people were to withhold from paying a recompence for instruction in the sacred writings, they would in time be disregarded;—and decrees pass accordingly.

nor for sing-
ing or lamen-
tation.

It is not lawful to receive wages for singing, or lamentation*, or for any other species of public exhibition, as this is taking a recom-

* Arab. *Noobá*. Crying over the dead, (by female mourners, who make it a profession.)

pence for an act which is of a criminal nature, and acts of that nature do not entitle to a recompence in virtue of a contract.

THE hire of any thing indefinite is invalid, according to *Haneefa*, unless from a partner.—The two disciples maintain that such hire is valid;—and decrees pass accordingly.—(This rule chiefly applies to such cases as where, for instance, a person lets a share or portion of his house to another, or lets his own share in a partnership-house to any other than his partner.)—The argument of the two disciples is that an indefinite part is capable of being used, (whence a proportionate hire is due,) and the delivery of it is practicable, either by the lessor vacating his share to the lessee, or by agreeing to hold it with him alternately.—The case is therefore the same as if he were to let it to a partner, or between two, which would be valid: consequently this resembles a case of *sale*.—The argument of *Haneefa* is that as the lessor, in this instance, lets to hire an article which he is incapable of delivering, the deed is consequently invalid.—The ground of this is that the delivery of an indefinite part of any thing is inconceivable; because delivery cannot be completely executed on one part without seizure on the other; and seizure, as being a perceptible act, cannot take place but upon a specific subject.—With respect to *evacuation*, it is regarded as a delivery, because it amounts to investiture, an act through which occupancy, or, in other words, a power of seizure, is obtained. With respect to *alternate occupancy*, on the other hand, that cannot be established but in virtue of a right of property in the use, which is an effect of the contract of hire. Now as the *effect* of any thing must be subsequent to that thing, it follows that the alternate occupancy is subsequent to the execution of the contract of hire: but ability to make delivery is one condition of the contract; and as the condition to a thing must precede that thing, it follows that the ability to make a delivery must precede the contract of hire. A thing, however, which is subsequent cannot be considered as antecedent; and hence the alternate occupancy, which is subsequent, is incapable of

Hire of indefinite articles.

being accounted a *delivery*.—Where, on the contrary, the lease is to a *partner*, the *whole* use arising from the article becomes the property of the lessee, and consequently no part of what he holds can be termed *indefinite*: neither is the difference in the nature of the usufruct (from part of it being in virtue of right of property, and part of it in virtue of a lease) injurious to the lessee in this instance.—Besides, the hire of an indefinite subject is unlawful from a *partner* also, (according to an opinion of *Haneefa*, as reported by *Hasan*.)—It is otherwise in a case of *supervient* indefiniteness, as that does not occasion contention. (A *supervient* indefiniteness is where a person lets an article to two persons, and one of the lessees dies,—or where two persons let an article to one person, and one of the lessors dies,—in which case the lease continues in force with respect to the other's share, indefinitely, and does not become invalid, according to the *Zahir Rawāyet*, for this reason, that ability to make delivery is not a condition merely because of the contract, but because of the obligation of delivery,—which obligation exists in the beginning, not afterwards, whence the ability of delivery is not a condition in the *continuance*.) It is also otherwise where an article is let to *two* persons, because in this instance a delivery of the *whole* is established, after which an indefinite division supervenes, because of the right of property of each party being separate.

Hire of a
nurse.

It is lawful to hire a nurse to suckle a child, at a certain rate of wages; because God has said in the KORAN, “IF THEY SUCKLE
“YOUR CHILDREN, PAY THEM THEIR HIRE;” and also, because, in the time of the prophet, such was the practice,—and likewise both *before* and *since* his time.—Some have said that the contract of hire, in the case in question, is a contract for *serving* the infant, the particulars of such service (namely attendance and milk) following as dependants, in the same manner as the colour in a contract for dying cloth.—(Others maintain that the contract is a contract for the *milk*, the attendance following as a dependant: and accordingly, if a goat be

be hired to give milk to an infant, no recompence is due.—The former opinion, however, is more conformable to LAW; because contracts of hire are not concluded for destruction or expenditure of an actually existent article; as where, for instance, a person hires a cow for the purpose of using her milk, which is invalid, as shall be shortly shewn in its proper place.)—Such, therefore, being the case, the contract in question is valid, provided the rate of hire be specified, considering it as hiring a person for the sake of her *attendance*.

IT is lawful to hire a nurse to suckle an infant in return for meat and clothing, on a favourable construction, according to *Haneefa*.—The two disciples maintain that this is not lawful, because as the recompence is indeterminate and unknown, the case is therefore the same as if the woman were hired to bake bread, or so forth, in return for her meat and clothing.—The argument of *Haneefa* is that the indeterminateness in question is not likely to engender strife, since it is customary to feed nurses in a liberal manner, with a view to render them kind and tender to the children under their care.—This case, therefore, resembles the selling of a measure of wheat out of a heap, which is lawful, although the seller be at liberty to give the wheat from whatever part of the heap he pleases, as an ignorance in that particular does not engender strife.—It is otherwise in the case of hiring a woman to bake bread, or the like, because an ignorance in that instance is calculated to occasion contention.—What is here advanced proceeds upon a supposition that no explanation has been given concerning the quantity or quality of the food and clothing agreed for to the nurse.—It is written in the *Jama Sagheer* that if a nurse be hired to suckle a *child* for her victuals and clothing,—in this way, that an explanation be given of the kind and fashion of her apparel, and the time of giving it, and a specific number of *dirms* appointed for her board,—and victuals be afterwards given in lieu of the money, it is lawful according to all, because in this case there is no ignorance.—Or, if the victuals be specified, and the quantity and quality explained,

this also is lawful, for the same reason; and in this instance it is not requisite that any time be fixed for giving the victuals, because articles of weight, and measurement of capacity, when described, become a debt, and a debt is sometimes prompt and sometimes deferred, like price, which consists of money.—It is, however, a condition, with *Haneefa*, that an explanation be given of the *place* where the victuals are to be delivered, in case of any expence (of *portage*, and so forth) attending it.—The two disciples, on the contrary, maintain that this is not a condition, as has been fully stated under the head of *SALE*.—It is otherwise with respect to *apparel*; for in that instance an explanation is requisite, not only of the *place*, but also of the *time* of delivery, as well as of the quantity; because clothing is not construed to be a debt except in a case of *Sillim* sale; and as, in that instance, a prompt payment is requisite, so also where the nurse is hired for a recompence in clothes, it is requisite that a prompt delivery be specified, as well as the quantity and the quality.

The hirer, in the case above stated, is not at liberty to prevent the husband of the nurse from having carnal connexion with her; because as such connexion is the husband's right, it is not in the hirer's power to annul it,—for this reason, that the husband, in case of his not being informed of the contract at the time of concluding it, is entitled to dissolve it, for the purpose of preserving his own right.—The hirer, however, may prevent the husband from having such carnal intercourse in *his* house, since that place is his exclusive right.—If, also, in consequence of such connexion, the nurse prove pregnant, the infant's guardians are at liberty to dissolve the contract, provided there be any apprehension of injury to the child's health from the use of her milk, as is most probable in such instances;—and for the same reason also, they are at liberty to dissolve the contract where the nurse falls sick.—It is also incumbent upon the nurse to prepare the child's victuals by mastication, and to avoid every species of food which might prove injurious to her milk, in pursuance of her duty.—In short, in all

all matters of this nature, regard is had to custom, where there is no divine ordinance. The performance, therefore, of every usual service to a child (such as washing its linen, preparing its victuals, and so forth), is incumbent upon the nurse. The *victuals*, however, must be provided by the father. With respect to what has been observed by *Mohammed*, that, “it is incumbent upon the nurse to “provide *oils* and *perfumes*,”—this is according to the custom of *Koofá*.

If the nurse above mentioned feed the child with goat's milk, during the term of hire, she is not entitled to any wages, as not having performed what was her duty, namely fosterage, or, in other words, the feeding the child with milk from her own breasts; for feeding it with milk from a goat is not fosterage, but merely *feeding it with milk*. Wages, therefore, are not due to her in this instance, as she has not performed what she had contracted for.

If a person deliver thread to a weaver, to make it into cloth, in consideration of an half thereof to himself, he is to receive a recompence proportionate to his work; and the same rule also holds if a person hire an ass to carry wheat, paying, in consideration, a measure of such wheat. The contract, therefore, is invalid in both these instances, because the recompence is made to consist of a thing obtained by the labour of the person or animal hired, and hence the case is analogous to that of an allowance made for grinding*, which has been prohibited by the prophet. (The case of *allowance for grinding* is where a person hires an ox to grind grain in consideration of a proportion from the flour or meal:—and this case is the grand criterion by which a judgment is formed of the invalidity in various instances of hire, more especially in our country.) The rea-

A contract of hire, stipulating that the recompence shall be paid from the article manufactured or wrought upon is invalid.

* Expressed by an *Arabic* phrase (*Kafeez Tehân*), which will not bear a literal translation. It is more fully explained in Vol. IV. in treating of *Compacts of Cultivation*.

son of the prohibition, in this instance, is that the hirer is incapable of delivering the recompence, (namely, a part of the woven cloth, or a part of the carried grain); for as the obtaining of it depends upon the act of the person or animal hired, the hirer cannot be accounted capable of making delivery merely in virtue of the capacity of that person or animal. The contract is therefore invalid, and an adequate hire is due. It is otherwise where a person hires an ass to carry *one* half of a parcel of wheat, in consideration of the *other* half; for in this instance no hire is due on account of the animal hired, as the hirer has constituted the owner of the ass proprietor of half of the grain upon the instant, in the manner of a prompt or advanced payment, and consequently the wheat is in partnership between them, for reasons which will be explained in a future example. It is to be observed that where a person hires an ass, to carry wheat, in consideration of a measure of such wheat, or an ox, to grind grain, the hire allowed must not exceed the value of what has been specified, because, as the hire is invalid, the *least* only of the two (the hire named, or an adequate hire) is due, since the person who lets the animal has agreed to remit any thing beyond. It is otherwise where two men enter into a partnership in collecting wood, and one of them says to the other, "I will take the whole wood, and pay you a recompence for your share in the collecting of it;" for in this case an adequate recompence is due, to whatever amount, (according to *Mohammed*,) inasmuch as no sum has been specified in this instance, whence no remission of any excess can be inferred.

Partners do not owe hire to each other with respect to their stock.

If a person hire another to carry wheat which is in partnership between them, no recompence is due; for in all grain so carried the porter works on his own account, whence a complete delivery is not made of the thing contracted for.

Any uncertainty in the terms invalid.

If a person hire another to bake ten particular *saas* of wheat into bread, "this day," for a *dirm*, it is invalid, according to *Hancefa*.

The

The two disciples, in the *Mabsoot*, article *Hire*, maintain that the contract in question is valid; because in this instance the performance of the *task* [of baking the bread] is the thing really contracted for, the mention of a time being considered merely as for the purpose of expedition, in order that the contract may be valid; and consequently the objection of uncertainty is removed. The argument of *Haneefa* is that the thing contracted for is uncertain; because the specification of a time argues that the thing contracted for is general usufruct, or, in other words, the hireling's surrender of himself [to service]; and, on the other hand, the specification of a particular act argues that such act is the thing contracted for. Now general usufruct and a particular act cannot be united; for where a particular act is the thing contracted for, no hire is due for the labourer's surrender of himself. As, moreover, neither of these has a preference over the other, and the advantage is to the *hirer*, in the latter instance, and to the *hireling* in the former, it follows that a contract of this nature would lay a foundation for strife. It is reported, from *Haneefa*, that where the hirer, instead of "this day" says "within this day," the hire is valid, as in such case the thing contracted for is the particular act or task specified: contrary to where he says "this day." The arguments upon this point are connected with Arabic grammar, and have already been stated in treating of *Divorce* *.

If a person hire land, stipulating that he shall be at liberty to plough and cultivate it, or to *water* and cultivate it, such contract is

A lease of lands is not invalidated

* The arguments in this example turn upon the distinction between the performance of a thing by *general* service, and the performance of the same thing in a particular instance; that is, between hiring a person for any business by the *day*, or so forth, and engaging him for the performance of the same business by the *particular task*. If the contract for a *particular task* be so expressed as to leave it uncertain whether the recompence specified be for the day's service, or for the particular work required, it is in that case invalid, (according to *Haneefa*,) and consequently no regard is had to the sum mentioned as the recompence, but the workman receives a proportionate hire for his day's work.

VOL. II.

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valid;

by stipulating
a right to per-
form any act
which does
not leave last-
ing effects.

valid; because he is entitled to cultivate the land in virtue of the contract; and as this is impracticable unless he plough and water it, he is consequently entitled to perform these acts upon it likewise; and every other act of this nature is in the same manner a requisite of the contract; nor does the mention of it cause invalidity. If, on the contrary, he stipulate that he shall be at liberty to plough the land *twice*, or to dig trenches in it, or to dung it, the contract is invalid; because, in this instance, an effect remains after the expiration of the term of hire, which is not a requisite of the contract. This condition, moreover, is advantageous to one of the contracting parties; and every stipulation of that nature invalidates a contract. Besides, in this instance, the lessor becomes, in fact, a tenant of the lessee with respect to such advantage as may remain to the land after the expiration of the lease; and consequently the contract involves one bargain within another, which is not lawful. Some explain ploughing *twice* to signify ploughing the land a second time, after having reaped a crop from it, and then returning it in that state to the owner; and concerning the invalidity in this instance no doubt can be entertained. Others, again, explain it to mean ploughing the land twice, and then sowing the grain in it. What is here advanced (with respect to the invalidity occasioned by stipulating a right of ploughing twice) applies solely to cases where the land is of a nature to be productive from *once* ploughing, and the term of hire only one year;—for if the term of hire be *three* years (for instance,) the advantage derived from ploughing twice wears out and no longer remains. By the term *trenches*, as here used, *small temporary* trenches are not to be understood, but *water courses*, such as are calculated to last, and yield an advantage the year ensuing.

A contract
stipulating
the recom-
pence to con-
sist of a simi-
lar usufruct is
nugatory.

If a person hire land to cultivate, in return for the right [on the part of the *lessor*] of cultivating other land, it is nugatory; in other words, it is utterly invalid. *Shafëi* maintains that it is valid. Analogous to this is the hire of a dwelling-house, in return for residence

in

in another house; the hire of apparel in return for the use of other apparel;—or the hire of a quadruped for riding, in return for a right of riding upon another quadruped. The argument of *Shaf'ei*, is that the advantage is the same as actual substance; and it is on this idea that hire is valid in return for a debt of wages*; for if those were not the same as actual substance, it would follow that the transaction is the exchange of one debt for another debt, which is null. The arguments of our doctors upon this point are twofold.—FIRST, contracts upon credit are rendered invalid by an unity of species alone; and as an unity of weight or measure is not essential, (according to our doctors, as has been already explained in treating of sale,) the contract in question, therefore, resembles the sale, upon credit, of cloth of a particular description in return for cloth of the same description.—SECONDLY, the validity of hire is admitted (in opposition to what *analogy* would suggest) from convenience and necessity; but no convenience or necessity whatever exists where the advantage is exactly the same on both sides: contrary to where the advantage derived on each part is different.

OBJECTION.—Where hire of one kind is in return for hire of another kind, although it be not rendered invalid by a non-existence of necessity or convenience, still it would follow that it is invalid, as being the sale of a debt for a debt.

REPLY. In this instance the subject from which the advantage accrues is made a substitute for the advantage, from necessity:—the recompence, therefore, is as a *price*; and accordingly, the transaction is a sale of substance for something else than substance; which is lawful.

If a quantity of wheat be between two men in partnership, and one of them hire the other, or his ass, to carry *his* share to a certain

Case of two partners.

* That is, wages owing from the person hired to the hirer; (as where the hirer had previously performed service to the person whom he now hires, and for which this person still owes him wages.)

place, and he, or his ass, carry the *whole* of the wheat thither, he is not entitled either to the recompence specified, or to a proportionate recompence. *Shafëi* maintains that he is entitled to the specified recompence; because, according to his tenets, advantage is the same as actual substance; and as the sale of an undefined substance is lawful, it follows that it is also lawful to receive a recompence in return for an undefined advantage. The case in question, therefore, is similar to where a person hires a building, held in partnership between himself and another, for the purpose of keeping grain,—or, a slave, held in partnership between him and another, for the purpose of making up apparel. The arguments of our doctors upon this point are twofold.—FIRST, the person in question here hires another for the performance of a matter the existence of which cannot be conceived; because the *carriage* or *portage* of any thing is a sensible or perceptible act, which is impossible with respect to a thing undefined;—and as the performance of the thing contracted for is impossible, it follows that no recompence is due.—SECONDLY, The person hired is a partner of the hirer with respect to every particle he carries, whence he carries on his *own* account also, and consequently does not perform what he had contracted for. It is otherwise where the thing contracted for is a partnership house, for keeping grain, for in this instance the thing contracted for is the *use* of the house, and a delivery of that may be effected, without the person depositing his grain therein, by the other evacuating it to him.

A lease of land is invalid, unless it specify the purpose to which the land is to be applied.

If a person hire land, without mentioning that it is for the purpose of cultivation, or, without mentioning what species of cultivation he means to employ it in, the contract is invalid; because land is hired for tillage, and also for other purposes; and, in the same manner, it is cultivated for various uses, some more and some less injurious to the soil. The thing contracted for is therefore uncertain; and accordingly, the contract is not lawful. Notwithstanding this, however, if the person who hires the land should cultivate it,

it, and the term of the lease expire, he is entitled to the specified rent, on a favourable construction. According to analogy he is not so entitled, (and such is the opinion of *Ziffer*,) because the contract, as being once invalid, cannot afterwards become valid.—The reason for a more favourable construction, in this particular, is that, before the complete fulfilment of the contract, the uncertainty has been done away; and it therefore becomes valid, in the same manner as where the uncertainty is done away before the contract has been yet concluded;—the case being analogous to where a feller and purchaser do away an undefined time of promise for payment or delivery, in sale, before the usual term of credit expires, or do away a right of option extended beyond the term of three days, before the expiration of those three days.—If, in this case, the lessor and lessee dispute before cultivation, the lessee being desirous of cultivating the land, and the lessor forbidding him, the contract becomes dissolved, in order that strife may be prevented.

If a person hire an ass to *Bagdad* (for instance) for one *dirm*, without specifying what it is to carry, and load upon it such a burden as men usually put upon that animal, and it die before it has proceeded more than half way, he is not responsible; because the article hired is as a *trust* in the hands of the hirer, although the contract be invalid. If, on the other hand, the ass arrive at *Bagdad*, the owner is entitled to the hire stipulated, upon a favourable construction; because in this instance the uncertainty has been done away, in the same manner as in the preceding example.—If, also, a dispute arise between the hirer and the owner of the ass, before it be loaded, the contract is dissolved, in order that strife may be prevented.

Responsibility does not attach, from the customary use of an article, under an indefinite contract.

C H A P. V.

Of the Responsibility of a Hireling.

Difference
between com-
mon and par-
ticular hire-
lings.

HIRELINGS are of two descriptions, *common* and *particular*.—A common * hireling is one with whom a contract of hire is concluded for work of such a nature as may be perceived by examining the subject:—and in this instance there is no occasion for any mention of a *term*; nor is he entitled to his hire or recompence until the work he has engaged for (such as *dying* or *fulling*) be executed, because the *work* is the only thing contracted for, where he engages to perform it in person, or the *effect* of such work, where he has not particularly engaged to perform it in person.—It is therefore lawful for him to work for the public at large, since no particular person has any exclusive claim to his service; and accordingly, he is termed *Ajeer Mooshtarik*, that is, a *general* or *common* hireling.—(The rules with respect to particular hirelings shall be discussed in their proper place.)

The article
committed to
a *common*
hireling is a
deposit:

AN article delivered to a common hireling is a *deposit* in his hands. If, therefore, it perish whilst in his possession, he is not in any degree responsible for it, according to *Haneefa*; and such also is the opinion of *Ziffer*.—The two disciples maintain that he is responsible, except where the article is lost or destroyed by any irremediable and irresistible accident, such as a fire burning down his house, or robbers, in such force as not to be repelled; because it is recorded of *Alee* and

* Arab. *Mooshtarik*, literally, *held in common*,—meaning one whose services are open to all, (such as a *tradesman*,) in opposition to a particular *servant*.

Omar that they understood a common hireling to be responsible; and also, because the care of the article is incumbent on him, as without such care he cannot perform his work upon it. When, therefore, the article is lost from any cause which might have been avoided such as usurpation or theft, this proves him to have been negligent, and he is consequently responsible, in the same manner as a trustee who lets to hire the deposit in his hands.—It is otherwise where the article is lost from some unavoidable cause, such as fire, sudden death, and so forth, since in this case he cannot be accused of negligence.—The argument of *Haneefa* is that the article is merely a *deposit* in the workman's hands, the possession of which does not involve responsibility, inasmuch as he took possession with consent of the proprietor; and accordingly, if it were lost from any unavoidable cause, he is not responsible,—whereas, if his possession of it involved responsibility, he would owe a compensation for it at all events, in the same manner as in a case of *usurped* property.—The care, moreover, of the article is incumbent upon the proprietor *dependantly* and not *essentially*, and accordingly no hire is due for such care. This case is different from that of an *hired* trustee; for the care of the deposit is *essentially* incumbent upon a trustee who acts for hire, because of the wages he receives.

A COMMON hireling is responsible in case of the loss or destruction of any article in the course of his work, as where a dyer or fuller tears the cloth entrusted to him, or a porter stumbles, or the tying of his load breaks, or the girth of a camel breaks, and thus the goods with which he is loaded fall to the ground, or a boat sinks from the mismanagement of the boatmen.—*Ziffer* maintains that the hireling is not responsible in those cases, because the hirer had ordered him to work in an absolute manner, and hence his order extends as well to dangerous as to safe operations,—in other words, to operations which subject his property to damage, and also to operations under which it continues uninjured. The hireling in question, therefore, is in the same predicament

but he is responsible if it be destroyed in the course of his work.

dicament with a *particular* hireling, or any assistant of a workman*. The argument of our doctors is that the orders of the hirer do not extend to any operations but what are mentioned in the contract; and those are to be supposed of a safe nature, since in virtue of them is obtained the thing contracted for, namely, the effect of them,—whence it is that if this effect be obtained through the work of any other than the hireling, still the recompence is due. The orders of the hirer, therefore, do not comprehend any operations that may be injurious, since through such the thing contracted for, namely the effect, cannot be produced. It is otherwise with respect to the assistant of a workman; because, as he works gratuitously, his work cannot be restricted to the condition of safety, for if it were so restricted, he would decline working gratuitously. It is also otherwise with respect to a *particular* hireling, as shall be hereafter explained.—(It is to be observed that the breaking of a camel's girth, or so forth, is supposed to originate with the hireling, inasmuch as the accident may be attributed to his want of care.)—A common hireling, therefore, is responsible for any thing which may be destroyed in the course of his work; excepting, however, where a MAN is destroyed, either by the sinking of a boat, or by falling from a camel or other animal, (although those accidents should have been occasioned by the driving of the camel or the navigating of the boat;) for in this instance the hireling is not responsible, as responsibility for a MAN cannot be incurred in virtue of a contract, nor in virtue of any thing but a *ʔandayat*, or offence against the person, whence it would be due, in this instance, not from the *hireling*, but from his *Akila*, who, however, cannot be made responsible by a *contract*.

If a person hire a porter to bring an earthen jar from the banks of the *Euphrates*, (for instance,) and he fall down upon the way and

* Meaning a person who assists the workman *gratuitously*; (as will be perceived by the context a little further on.)

break the jar, the hirer has it at his option either to take the value which the jar bore at the place where it was taken up, (in which case the porter is not entitled to any recompence,) or to take a compensation for the value it bore at the place where it was broken, paying the porter a proportionate hire.—Responsibility is incurred in this instance, because (as was before said) the falling of the jar was either owing to the porter stumbling, or his rope breaking, which is attributed to him:—and an option is allowed to the hirer; because, where the jar is broken upon the road, the circumstance admits of two constructions; for the hireling is in one shape guilty of a transgression from the beginning, inasmuch as the carriage of the jar from the place where it was taken up to the place directed is one act; and in another shape he is not guilty from the beginning, since the carriage was undertaken with the consent of the owner, and consequently no transgression took place until the breaking of the jar;—the owner, therefore, has it at his option to proceed upon either ground;—if he proceed upon the *second* ground, the hireling is to receive a recompence in proportion to the work he has rendered to the hirer; but if, upon the *first* ground, he is not to receive any thing, since in this view he has not rendered the hirer any service whatever.

If a surgeon perform the operation of phlebotomy in any customary part, he is not responsible in case of the person dying in consequence of such operation.—This is according to the *Mabsoot*.—It is written, in the *Jama Sagbeer*, that if a farrier bleed an animal for a *dánik*, and the animal die in consequence, or if a cupper perform the operation of cupping upon a slave by direction of his master, and the slave die in consequence, no responsibility is incurred.—It is to be observed that the doctrine of the *Mabsoot*, in this particular, proceeds upon the idea of a restriction to the performance of the operation in some customary part; but it is unrestricted with respect to the assent of the party or otherwise; whereas the doctrine in the *Jama Sagbeer* proceeds upon the idea of a restriction with respect to the assent [of the owner of the

A surgeon, or farrier, acting agreeably to customary practice, is not responsible in case of accidents.

slave or animal,] but is unrestricted with respect to the part on which the operation is performed. Each of these reports, therefore, affords an argument with respect to the other; and consequently the cases in both are restricted to this, that the operation be performed in the usual part, and with consent of the party.—The ground on which the LAW proceeds in this particular is, that it is impossible for the operator to guard against consequences, as those must depend upon the strength or weakness of the constitution in bearing any disorder or pain; and as this is unknown, it is therefore impossible to restrict the work to the condition of safety.—It is otherwise with respect to tearing cloth, as before treated of, because the strength or weakness of cloth may be known by skill and attention, whence it is possible in that instance to restrict the work to safety. Thus much with respect to *common* or *general* hirelings.

A particular
hireling

A PARTICULAR hireling signifies one who is entitled to his hire in virtue of a surrender of himself during the term of hire, although he do no work; as, for instance, a person who is hired as a *servant* for a month, or to *take care of flocks* for a month, at a certain rate, under a condition that he shall not serve or tend the flocks of any other person during that term.—An hireling of this description is denominated an *Ajeer Wahid*, or *singular* hireling, because the advantage of his service belongs exclusively to a single person during the term of his engagement, and the wages he receives are opposed to such advantage:—and as the hireling, in this instance, is entitled to his hire in virtue of his surrender of himself, for the term of hire, he is entitled to his wages although he do no work, or although his work be afterwards undone; as where, for instance, a person is hired to make up a dress, and he sew it accordingly, and the sewing be afterwards ripped out, in which case he is nevertheless entitled to his hire.

is not respon-
sible for any
thing he loses
or destroys.

IF an article be lost whilst in the hands of a particular hireling, without his act, by a thief stealing it, (for instance,) or an usurper carrying it away,—or, if it be lost by his act, he is not responsible for

it.

it.—He is not responsible in the former instance, because the article is a *deposit* in his hands, since he took possession of it with the owner's consent.—(This, according to *Haneefa*, is evident:—and it is also evident according to the two disciples, because they hold that the obligation of responsibility upon a *common* hireling proceeds upon a favourable construction of the LAW, in order that men's property may be in security; but as a *particular* hireling does not engage to work for every person, it is still more likely that property is safe with such an hireling; and therefore, in this case, the law proceeds upon analogy.)—He is also not responsible in the *second* instance, because, as the advantage of this hireling's service is the property of the hirer, it follows that, where he directs him to act with his property, such direction is valid: consequently the hireling is his deputy; his acts, therefore, are the same as the acts of his principal, the hirer, and of course he is not responsible.

CHAP. VI.

Of Hire on one of two Conditions.

IF the owner of cloth say to the taylor whom he has engaged, “If you make up this cloth in the *Persian* fashion, you shall have one *dirm*, and if in the *Turkish* fashion, you shall have two,”—it is valid, and the taylor is entitled to a recompence according to whichever of the two fashions he makes up the cloth in. In the same manner, also, if he say to a dyer, “If you dye this cloth purple, you shall

The hire is valid, of a *tradesman*, under an alternative with respect to work;

or of an article under an alternative of another article,

or with respect to the use.

“ have one *dirm*, and if yellow, you shall have two,” the dyer is entitled to a recompence, according as he dyes the cloth purple or yellow.—The same rule also holds if the proprietor of the article hired leave two things at the option of him who hires it;—as if he were to say to him “ I let to you this house, for one month, for five *dirms*, “ or this other house, for one month, for two *dirms* : ”—and so likewise, if he leave at his option two different distances; as if he were to say “ I hire to you this camel, to *Koofa*, for five *dirms*; or this, to “ the half-way station, for so much : ”—and the same, also, if the proprietor give an option of *three* things: but if he give an option of *four* things, it is invalid.—In all these cases regard is had to sale; in other words, they are judged of by sale; for if a person agree to sell cloth, under this condition, that the purchaser shall take either of two particular pieces, as he pleases, it is valid; (and so likewise, if he allow the purchaser an option of one out of *three* pieces;) but it is not valid if he allow him an option of one out of *four* pieces.—The reason of this is that as cloth is of three descriptions, a good sort, a bad sort, and a medium sort, an option of three is of use, and necessity is thereby answered; but as, in a case of four pieces, necessity is answered by a choice from a smaller number, so an option out of four is useless.—In the same manner, also, in hire, necessity is answered by an option from three things, as those comprehend a good, a bad, and a middling sort; and there is no occasion for four, as necessity is answered by fewer.—There is, however, this difference between sale and hire, that sale is not valid unless an option of determination be stipulated; for if a person sell one of two slaves, it is valid only in virtue of stipulating an option of determination.—A contract of hire, on the contrary, is valid, for one of two advantages, without stipulating an option of determination, because the recompence is not due in virtue of the contract, but in virtue of the usufruct or work; and consequently, when the party commences the enjoyment of one of the advantages, the thing contracted for becomes known: but as, in a case of sale, the price of the article is due in virtue of the contract, uncertainty

tainty consequently exists in that instance to such a degree as leaves room for strife, unless the purchaser possess an option of determination.

If a person say to a taylor whom he hires, "If you make up this garment this day, you shall have one *dirm*; and if to-morrow, you shall have half a *dirm*," in this case, provided the taylor finish the garment within the day, he gets a *dirm*, or if he finish it the next day, he receives a proportionate hire (according to *Haneefa*) where that does not exceed half a *dirm*; in other words, he gets the least of the two, between a half *dirm* and his proportionate hire.—It is written, in the *Fama Sagheer*, that he is entitled to his proportionate hire, not being less than half a *dirm*, nor more than one *dirm*.—The two disciples allege that both conditions are valid, and consequently, that if he perform his work on the morrow he gets an half *dirm*.—Ziffer maintains that both the conditions in question are invalid; because sewing, or taylor's work, is one thing to which the hirer, in this instance, opposes two returns, (namely, one *dirm*, and half a *dirm*), in the manner of a consideration: the recompence, therefore, is uncertain.—The reason of this is that the mention of *this day* is merely for the purpose of hastening, and the mention of *to-morrow* for the purpose of giving ease; and there is no suspension; for if the hirer were to express the contract "make up this garment by to-morrow, for half a *dirm*," the contract is established, inasmuch that if he make up the garment within the present day, he is entitled to half a *dirm*. Hence it appears that the mention of *to-morrow* is merely for the sake of ease, and is not a suspension; and consequently two specifications are united in one day.—The arguments of the two disciples upon this point are twofold. FIRST, the mention of *this day* is for the purpose of determining a time, and the mention of *to-morrow* is by way of a condition: consequently two specifications are not united in one day. SECONDLY, quickness and delay are the designs: and the case therefore resembles that of two species of work, such as *Persian* and *Turkish*.

The:

Case of a tradesman hired under an alternative with respect to time.

The argument of *Haneefa* is that the mention of *to-morrow* is certainly by way of a condition.—The mentioning *this day*, moreover, cannot be construed to imply *fixing a time*, for otherwise the contract of hire would be invalid, because of its uniting time and work. Such, therefore, being the case, it follows that two specifications are united in the mention of *to-morrow*, not in the mention of *this day*: consequently the contract with respect to *this day* is valid, whence the hire mentioned is due, [in case of the work being finished within the day;] but it is invalid with respect to *to-morrow*, whence [in case of the work being finished on the morrow] a proportionate hire is due,—not exceeding, however, half a *dirm*, as that is what was specified for *to-morrow*.—With respect to the quotation from the *Jama Sagheer* upon this subject, that “he is entitled to his proportionate hire, not being less than half a *dirm*, nor more than one *dirm*,” the ground on which it proceeds is, that the first specification does not become extinct on the second day, because then both specifications unite: regard, therefore, is had to it, with respect to preventing any excess beyond it; and to the second specification, with respect to preventing any deficiency.—If, in the case in question, the taylor finish the garment on the *third* day, he gets whatever is least of the two, his proportionate hire, or half a *dirm*. This is approved; because, as the hirer was unwilling to have the work delayed for one day, it follows that he was still more unwilling to have it delayed *longer* than one day.

Case of hire of a *shop*, under an alternative with respect to the business to be carried on in it;

If the lessor of a shop say to a person about to hire it, “If you place a perfumer in this shop the rent is one *dirm*, or if a blacksmith, it is two,” the contract is valid, and the lessor is entitled to one or other of the rents specified, according to which of the two trades may be exercised in the shop. This is the doctrine of *Haneefa*. The two disciples maintain that a contract thus expressed is invalid.—In the same manner, also, if a person hire a house, under this condition, that “if he reside in it himself, the rent shall be one *dirm*, or if he place a blacksmith in it, the rent shall be two *dirms*,” it is valid;

valid, according to *Haneefa*, whereas the two disciples deem it invalid.—If a person hire an animal to *Heera* for one *dirm*, under a condition that if he proceed on to *Kadseea* he shall pay two *dirms*, it is valid: and in this instance, also, the above difference of opinion may be inferred; that is to say, this example is stated in the book [of *Kadooree*] generally, without mentioning any difference of opinion; but it bears the construction of a difference of opinion, and also of an agreement of opinion.—If a person hire an animal to *Heera*, under this condition, that “if he load it with a *Koor* of barley he shall pay one *dirm*, or if with a *Koor* of wheat he shall pay two *dirms*,” it is valid according to *Haneefa*. The two disciples maintain it to be invalid.—The ground on which the two disciples proceed is, that in all the instances here recited the thing contracted for is uncertain; and in the same manner, the hire, as being one of two things, is also uncertain; and uncertainty occasions invalidity.—It is otherwise in the example of making up apparel after the *Persian* or the *Turkish* fashion, because the hire is due on account of the work, and in this instance the uncertainty is removed as soon as the work is begun; whereas in the examples in question the hire is due on account of the relinquishment and delivery of the house or animal, whence the uncertainty still continues, because after delivery, in case of no use being made of the article, it is not known which of the two hires specified is due, (for it is a principle, with the two disciples, that hire is due on account of relinquishment and delivery.)—The argument of *Haneefa* is that the lessor, in the case in question, gives the lessee an option of either of two valid contracts, of different descriptions; for the hirer himself residing in the house is different from his placing a blacksmith to reside in it; and such being the case, the contract is valid, in the same manner as in the example of making up apparel after the *Persian* or the *Turkish* fashion.—With respect to what is advanced by the two disciples, that “the hire is due on account of relinquishment and delivery, whence the uncertainty still continues,” it may be replied that the design of the contract of hire is advantage or usufruct; because,

and of an animal, under a condition with respect to the journey it is to perform,

or the load it is to carry.

as

as such contracts are legalized to answer the necessity of mankind, it is evident that they are never entered into but with a view to such advantage; and the uncertainty is removed upon the advantage commencing.—As, moreover, the relinquishment and delivery, without any enjoyment of the use, (which alone constitutes endowment,) are not principles, but rather mere accidents, there is no necessity to guard against uncertainty at the period of delivery.—Besides, if it be required, in a contract of hire, that the hire be due on the instant of delivery, it follows that the *smallest* of the two hires specified is due, as that is undoubted:—the hire, therefore, is not uncertain.

C H A P. VII.

Of the Hire of *Slaves**.

An hired servant cannot be taken upon a journey, unless it be so stipulated in the contract.

IF a person hire a slave, as a servant, he is not at liberty to carry such slave along with him upon a journey, unless this be a condition of the contract; because, as travelling is attended with additional trouble, a contract in general terms is not held to extend to it; whence it is that travelling is a sufficient plea for breaking off a contract of hire.—It is therefore requisite that, in the contract in question, travelling be particularly stipulated, in the same manner as the residence of a blacksmith or fuller in a dwelling-house.—Besides, the difference between stationary service and travelling service is evident; and consequently, upon stationary service being ascertained or specified, the other descrip-

* It is a common practice, in *Arabia*, *Persia*, &c. for slaves to hire themselves in the capacity of menial servants, being accountable to their master for the wages they receive.

tion (namely, travelling service) cannot be included;—in the same manner as riding upon an animal; as for instance, where a person in general terms hires an animal to ride, and the rider is afterwards ascertained, the hirer is not at liberty to set any other person upon the animal; and so likewise in the present case.

If a person hire an inhibited [absolute] slave for the term of one month, and pay him his wages after the performance of service, he is not at liberty to resume such wages. The ground of this is that the hire in question is valid, on a favourable construction, where a slave is not otherwise occupied. Analogy would suggest that it is invalid, as the proprietor of the slave has not given his consent, and the slave is a *Mahjoor*, or inhibited;—in the same manner as if the slave were to die before the completion of the service; in which case the hirer would be responsible for his value; but he would not be responsible for any wages on account of the service performed, since in employing the slave he becomes an usurper,—whence he is, in case of the slave's death, required to pay a compensation for his value; and as, upon so doing, he becomes proprietor of the slave from the first instant of employing him, he thus appears to have derived an advantage from his *own* slave; wherefore, in such case, no wages are due.—The reason for a more favourable construction, in this instance, is that the transaction in question may be considered in two shapes; for first, it may be regarded as advantageous, on the idea of the slave being unoccupied by any other business, and remaining in safety; and secondly, it may be regarded as injurious, on the idea of the slave dying before he finishes his service.—Now, on the idea of the transaction being advantageous, the slave is licenced therein, in a manner analogous to the acceptance of a gift. The contract of hire therefore is valid; and such being the case, it follows that the hirer is not at liberty to take back the wages.

Wages paid to an inhibited slave, hired without the consent of his owner, cannot be resumed.

The usurper of a slave is not responsible for what the slave earns during the term of usurpation.

If a person usurp a slave, and the slave afterwards let himself to hire, and the usurper receive his wages, and expend the same, he is not responsible for them, according to *Haneefa*.—The two disciples allege that he is responsible for the wages, because he has acted with the property of the master without his consent; (for the contract of hire is valid, on the grounds stated in the preceding example.) The argument of *Haneefa* is that responsibility does not attach except in the case of destruction of *protected* property*, (for the fixing of a price upon property is for the purpose of protecting it.) Now the wages in question are not in a state of protection or custody, in regard to the master, although they be so with respect to another, because the protection or custody of property is established only by actual possession, such as may admit of the care of it, like the possession of the proprietor, or his deputy; and the seizure of the slave is not the seizure of his master, since the slave himself is in the possession of an usurper, and being thus incapacitated from protecting his own person, is therefore incapable of protecting his wages from the usurper.—If, however, the master find the wages in the usurper's possession, he is entitled to take them from him, as he in this case discovers his own property.—In the case in question, also, it is lawful for the slave to take possession of his wages from the usurper, according to the opinion of our three doctors, since, if not otherwise employed, and remaining safe, he is licenced with respect to the transaction, because of its being advantageous, as was before mentioned.—It is different where a master lets his slave to hire; for in this case the slave is not at liberty to take possession of his wages unless his master constitute him his agent for that purpose, because receiving the wages is one of the rights of the contract.

Case of a slave hired

If a person hire a slave for two months, with this distinction, that

* Arab. *Mâl Mohirrez*.—The meaning of this has been fully explained elsewhere. (See *Hirz*, and *Mohirrez*.)

he shall serve one month for four *dirms*, and one month for five *dirms*, for different terms. it is lawful; and the hire is for four *dirms* in the first month; because the month first mentioned must be construed to mean the month immediately succeeding the execution of the contract, in order to its validity; for otherwise the contract would be invalid, since in this case a month would appear included in it which is not specified, and this would be invalid.—Besides, the act of hiring infers that the hirer has immediate occasion for the service of the slave, whence the month in question must necessarily be construed to mean the month immediately succeeding the execution of the contract, in order that the hirer's necessity may be answered; and such being the case, the second month must in the same manner be necessarily construed to mean the month immediately succeeding the first month.

If a person hire a slave for one month, at the rate of one *dirm*, and take possession of the slave in the beginning of the month, and at the end of the month, the slave having absconded or fallen sick, the hirer and the owner or master dispute,—the hirer asserting that the slave had absconded or fallen sick in the beginning of the month, and the master, that he had not fallen sick or absconded until within a short time,—the assertion of the hirer must be credited.—If, on the other hand, the hirer produce the slave, he being then present and in good health, the assertion of the master must be credited; because, as the parties differ upon a point which is of a problematical nature, a preference must be given to the side of the question which is best supported by apparent circumstances. The principle upon which the LAW in this instance proceeds is to be found in the case of the running or stopping of a mill stream; for if the hirer of a mill dispute with the proprietor concerning the running of the stream during the term of hire*, in this case the assertion of that party is credited on whose behalf

Case of a hired slave absconding before the expiration of the term.

* He asserting that the stream had not run at all, and consequently that the mill stood still during the whole term.

apparent circumstances bear testimony *.—If, on the contrary, they dispute concerning the deficiency in the running of the stream,—as if the lessee were to say that it had not run for *ten* days, and the lessor that it had not run for *five* days, in] this case the assertion of the tenant must be credited, or evidence on the part of the lessor.

CHAP. VIII.

Of Disputes between the Hirer and the Hireling.

In cases of dispute with a tradesman concerning the orders he has received, the assertion of the employer must be credited;

IF a dispute arise between the taylor and the owner of cloth,—the owner asserting that “he had directed the taylor to make the cloth “into a *vest*,” and the taylor that “the owner had directed him to “make it into *drawers*,”—or if a similar dispute happen with a *dyer*, the owner of the cloth affirming that he had directed him [the dyer] “to colour the cloth yellow,” and the dyer that “he [the owner] “had directed him to dye it red,”—in either case the declaration of the owner of the cloth must be credited, since it is from him that the orders proceed.—The ground of this is, that as, if the owner of the cloth were to deny the original order †, by disavowing the contract of hire, his word would be credited,—so, in the same manner, his word must be credited where he denies the description or qualification of the

* That is to say, if, at the time of the assertion, the stream be running, the proprietor must be credited; but if otherwise, the tenant.

† That is, were to deny his ever having given any order (with respect to dying or making up the cloth.)

order.—He must, however, be sworn, because he in this instance denies a thing which, if he were to *acknowledge* it, would be binding upon him. Upon the owner of the cloth swearing, the taylor becomes responsible; that is, the owner of the cloth has it at his option either to take the value of the cloth,—or to take the drawers, paying the taylor an adequate hire.—In the same manner, also, in the case of dying, upon the owner of the cloth swearing, he has it at his option either to take a recompence for the value of the cloth uncoloured, or to take the dyed cloth, paying the dyer an adequate hire not beyond the value,—because the dyer, in acting contrary to his instructions, stands in the same predicament with an usurper.

If a dispute arise between the owner of cloth and the dyer, taylor, or other workman,—the owner asserting that “he [the workman] “had agreed to execute the work without hire,” and the workman that “he wrought for hire,” the assertion of the owner must be credited, inasmuch as he both denies any price having been put upon the workman’s labour, (which can only be effected by a contract,) and also any responsibility, or, in other words, any hire being due, which the owner claims; and the assertion of the defendant [upon oath] must be credited. *Abao Yoosaf* maintains that if the workman be one commonly employed by the owner of the cloth, and with whom it has been usual for the owner to fix an hire for his work, he is entitled to a hire proportionate to what he performs; but that, if he was not commonly employed by the owner, he gets nothing whatever; and the reason is, that it is only former practice which can furnish a ground of requisition of wages, and establish the rate at which they are to be fixed in the present instance. *Mohammed* says that if it have been a general and known practice of the workman to work for hire, his word must be credited, because whenever he opens a workshop for the purpose of carrying on his business, this stands in place of an express declaration that he works for hire, as apparent circumstances signify thus much. It is to be observed that the opinion of *Haneefa*,

and so also,
if the dispute
be with re-
gard to wages.

as

as here stated, proceeds upon analogy, the owner of the cloth standing as the *denier*, or *defendant*. The opinion of the two disciples, on the other hand, proceeds upon a favourable construction.—In reply to what they advance in this particular it may be observed that apparent circumstances may suffice to *repel*, but are not sufficient to *establish* a claim; in other words, if a person advance a claim, such claim may be set aside by apparent circumstances, but apparent circumstances are incapable of constituting proof, or of establishing any thing in his behalf; and, in the present instance, it is required that a claim be established. *Sheikh-al Islām* remarks that decrees pass according to the opinion of *Mohammed*,—as is also mentioned in the *Kafēa*.

C H A P. IX.

Of the Diffolution* of Contracts of Hire.

A contract
for the hire
of a house is
dissolved by a
defect in it,

IF a person hire a house, and then discover a defect in it, such as renders it uninhabitable, he is at liberty to dissolve the contract; because the contract was executed with a view to advantage; and as that continually, from time to time, is the object of the hirer, it follows that the defect discovered in the house had existence previous to his obtaining possession of the thing actually contracted for, although it had occurred subsequent to taking possession of the house, in the same manner as where a defect has taken place in merchandize before the pur-

* Arab. *Fisḥ*; literally, a *breaking off*.

chafer obtains possession of it. If, however, the hirer derive the advantage, [that is, make use of the house,] he assents to the defect; and in such case the whole consideration (namely, the rent) is incumbent upon him, in the same manner as in sale.—If, also, the lessor perform what is requisite to remedy the defect, the hirer is in that case without an option, as the reason for such option is then done away.

If a house fall to decay, or the wells for watering land dry up, or a mill stream cease to run, the contract of hire is dissolved, because in such case the thing contracted for (namely, exclusive advantage) is defeated before possession, and the case is therefore the same as where merchandize perishes before possession, or where an hired slave dies.—Some of our modern doctors hold that the contract of hire is not dissolved in this instance, because the advantage has been defeated in a manner which admits a recovery of it. The case is therefore the same as where a slave dies after purchase, but before delivery; and as, in that case, the contract [of sale] is not dissolved, so likewise, in the present instance, the contract [of hire] is not dissolved.—It is recorded, from *Mohammed*, that if, in the case in question, the lessor remove the defect, by repairing the house, the hirer must abide by the contract, and also the lessor.—From this it is to be inferred that the contract is not dissolved.—It is, however, dissolved.

If a mill-stream cease from running, and the mill-house be applicable to any other use than that of grinding grain, the hirer must pay a rent proportionably to the use derived from such house, as that is a part of what was contracted for.

If one of the contracting parties die, and the hirer had entered into the contract of hire on his own account, it [the contract of hire] is dissolved; because if the contract were still to remain in force, it would follow that the usufruct, or rent, then becomes the right

or by its falling to decay; and the hire of land, by its wells being dried up,—or of a mill, by the mill-stream stopping;

(but if the mill-house be used, a proportionate rent is due.)

A contract of hire is dissolved by the death of one of the contracting parties, being a principal.

of a person who was not a party to the contract, namely, the heir, (since it would shift from the deceased to his heir,) which is unlawful. Besides, with respect to the lessor, it is the use of *his* property which forms the subject of the contract; and as, in consequence of his decease, this property changes to his heir, it follows that the contract of hire becomes null, because of the subject being lost; for a change in the right of property is the same as a change in the thing itself.—With respect to the hirer, or renter, on the contrary, if the contract were to remain in force after his decease, it can only do so upon the principle that his heir is his substitute. But the use of a house cannot be a heritage without the house itself, because inheritance is a succession, which is impossible except with respect to a thing which endures at both times, so as to be at first the right of the person through whom inheritance descends, and at last to be succeeded to by his heir.—As, therefore, inheritance cannot hold with respect to the use, the contract of hire is necessarily annulled. It is otherwise where a person enters into a contract of hire on behalf of any other than himself, such as an agent, an executor, or the procurator of a *Wakf*; for in that case the contract is not annulled, since if the contracting party die, the contract is then transferred to him in whose behalf it was executed, and he consequently becomes, by construction of LAW, the contractor.

It admits a
reserve of op-
tion.

A RESERVE of option is valid in hire. *Shafei* maintains that it is invalid; because if a right of option be reserved to the hirer, it is impossible for him to reject, that is, to return the thing contracted for complete, since in such case some part of that thing is lost; or if, on the other hand, a right of option be reserved to the lessor, it is impossible for him to make a complete delivery; and either circumstance is repugnant to the validity of option. The argument of our doctors is that a contract of hire is a contract of commerce, in which it is not required that possession be taken at the meeting of the contract;

tract*; and a condition of option may therefore be lawfully inserted in it, in the same manner as in a contract of sale.—The cause, moreover, of the validity of option, in a contract of sale, (namely convenience,) is also to be found in a contract of hire.—In answer to the arguments advanced by *Shafëi*, it may be observed that the circumstance of a part of the subject of the contract being lost is not repugnant to a rejection: in opposition to *sale*, as in that instance the circumstance of any part of the subject of the contract being lost is repugnant to a rejection under conditional option, or option from defect.—The reason of this is that, in sale, a complete return of the article is practicable, under conditional option, or option from defect, whereas in hire this is impracticable; a *complete* return of the subject of the contract is therefore required in the one case, but not in the other.—As, moreover, a complete delivery is impracticable in hire, the hirer may be compelled to take possession, in case of the lessor making delivery of it at a time when part of the term has elapsed:—in other words, where a person takes a house (for instance) for a year, and the lessor does not deliver it until after the lapse of a month, the lessee is not at liberty to decline taking possession of it for the rest of the year.

A CONTRACT of hire is dissolved by a pretext†, according to our doctors.—*Shafëi* maintains that it is not dissolved but by a defect or failure, because as (agreeably to his tenets) the advantage stands in place of actual substance, (whence it is that a contract holds with respect to it,) the case therefore bears a resemblance to sale.—The argument of our doctors is that advantage is the thing contracted for; and as that is not a subject of seizure, a pretext in hire resembles a failure or defect in merchandize existing before it be taken possession of,—in

It is dissolved by the occurrence of any sufficient pretext for dissolution.

* Meaning, at the time and place where the contract is executed.

† Meaning (in this place) any circumstance which would render it impossible to carry the contract into execution without inducing, to one or other of the parties, an injury not provided for or mentioned in the contract.—It is more fully explained a little farther on.

which case the contract of sale is annulled, as the seller cannot carry it into execution without bearing or occasioning an injury, not incurred by it; and the same reason holds in hire also, as this is the meaning of an *Ooxir*, or pretext, according to our doctors.

Circumstances which form a pretext for dissolving contracts of hire.

If a person, being afflicted with the toothach, hire a surgeon to draw one of his teeth, and the pain afterwards cease,—or hire a cook to prepare a marriage-feast, and afterwards repudiate the bride by her own desire *, the contract of hire is dissolved, because if it were to continue in force, the hirer would suffer a superinduced injury not incurred by the contract:—and the same rule also holds, if a person hire a shop for traffic, and his property be all afterwards disposed of.

If a person let to hire a house or shop, and afterwards become poor and involved in debt to a degree which he is unable to discharge but by the price of the house or shop, the *Kâzee* must in this case dissolve the contract of hire, and sell the place for payment of the debt; because in the endurance of the contract the lessor sustains a superinduced injury not incurred by the contract,—which superinduced injury, in this instance, is that the *Kâzee* will otherwise seize and imprison him on account of the debts, as he cannot be certain whether the debtor speaks truly in declaring that “this is his only property.” From the expression “the *Kâzee* must in this case dissolve the contract,” it may be inferred that a decree of the *Kâzee* is requisite to the dissolution; and the same is mentioned in the *Zeeadât*, treating of a pretext of debt. *Mohammed*, on the other hand, in the *Jama Sag-beer*, says “Whatever I have described to be a pretext, is competent “to the annulling of hire;”—whence it may be inferred that there is no occasion for a decree of the *Kâzee*; because, as a pretext, in hire,

* See *Khoola*.—This species of divorce most commonly happens in consequence of an aversion conceived by a wife to her husband at their first meeting.

is the same as a defect in merchandize before seizure, (as was before mentioned,) it follows that the contracting party may of himself dissolve the contract.—The ground of the opinion in the *Zeeadât* is that as, concerning the dissolution of hire on account of a pretext, there is a difference of opinion, it is therefore requisite that the *Kâzee* issue a decree and render it obligatory. Some of the *Haneefite* doctors endeavour to reconcile both opinions, by explaining that if the pretext be not of an evident nature, (such as *debt*,) there is no occasion for a decree of the *Kâzee*; but if it be not evident, a decree of the *Kâzee* is requisite to render it so.

If a person hire an animal to carry him upon a journey, and something afterwards occur to prevent his proceeding, this is a pretext; for if the contract were put in force, he might be subjected to injury,—as a person may go upon a pilgrimage, and the proper season for it may in the mean while pass away,—or he may go in search of a person who is indebted to him, and that person in the mean time may appear,—or he may proceed upon a trading excursion, and may in the mean time become poor.—If, on the contrary, the obstacle to the journey occur to the *Makâr*, or person who lets the animal to hire*, it is not admitted as a pretext, because it is in his power, if he do not chuse to go himself, to send the animal under the care of one of his servants or apprentices.—If, also, the *Makâr* fall sick, so as to be incapable of proceeding upon the journey, this is not a pretext, according to the *Mabsoot*.—*Koorokbee* is of opinion that it is a pretext, since sending his animal under the care of another person is not altogether void of injury:—the contract, therefore, is set aside in a case of unavoidable necessity, as in sickness, but not in a case of mere option, as in health.

* *Makâr* is a person whose business it is to let horses, camels, &c. to hire.

If a person let his slave to hire, and afterwards sell him, this is not a pretext, because he sustains no injury in case of the contract being put into force, the only consequence incurred being, that his right of advantage (from the slave's hire) is lost, which is out of the question in the present instance.

If a taylor hire a servant to sew for him, and he afterwards become bankrupt, and quit his business of taylor, this is a pretext; for if the contract were to continue in force he would sustain injury, because of his means (namely, his capital) being lost.—It is proper to remark, that by the taylor mentioned in this example is to be understood one who carries on business on his own account: for with respect to a taylor who works for hire, his only capital is a needle, thread, and scissors, whence he cannot be considered as becoming bankrupt. If a taylor, who has hired an assistant as above, be desirous to quit his business of taylor and to pursue the business of a money-changer, this is not a pretext, as it is in his power to place the hireling in a particular part of his shop for the purpose of exercising the business of a taylor, whilst he himself pursues the business of a money-changer in another part.—It is otherwise where a person hires a shop to carry on the business of a taylor, and is afterwards desirous to exercise some other trade, for this is not a pretext; the reason of which (as mentioned in the *Mabfoot*) is that one person cannot exercise two different professions.—In the instance, however, of a taylor hiring a servant to sew, the persons are *two*, and consequently may exercise two different trades.

If a person hire a servant to attend him in a city, and afterwards travel, this is a pretext, as not being altogether void of injury; for the trouble of attendance is greater in travelling; whence if the servant were to go upon the journey, he would sustain an injury; or if, on the other hand, the hirer were prevented from undertaking the journey, he on his part would be injured; and as neither is to incur an injury by the contract, it follows that the circumstance in question forms

forms a pretext.—The same rule also holds if the servant be hired in an *absolute* manner, by the hirer saying to him (or to his *master*, supposing the hireling to be a slave) “I hire you” (or “I hire your slave”) to wait upon me,” without restricting the service either to a stationary or a travelling description, because it has been already mentioned that the hire is in such case restricted to *stationary* service.

If a person let land, and be afterwards desirous to make a journey, this is not a pretext, because it does not induce any injury, since the lessee or hirer has it still in his power to derive his advantage from the land, after the lessor's departure.—If, on the contrary, the lessee be desirous to make a journey, this is a pretext, since a continuance of the lease must either prevent the journey, or induce an obligation of rent without residence, which would be injurious.

SECTION.

MISCELLANEOUS CASES.

If a person either hire or borrow land, and in burning the *Hissayed*, or stubble and roots of the soil, happen to burn any thing upon the neighbouring lands, he is not responsible; because as, in exciting the cause of the destruction, he was not guilty of any transgression or trespass, he therefore stands in the same predicament with a person who digs a well in his own house*.—Some say that this holds only

A hirer or borrower of land is not responsible for accidents in burning off the stubble, &c.

* A person digging a well on the public highway, or in any other place of general access, is responsible for the fine in case of any person being killed by falling into it; but a person digging a well in his own house or land is not responsible.

where he sets fire to the stubble during a calm, the wind rising afterwards;—for if he set fire to it whilst the wind is blowing, he is responsible, as he must in such case be sensible that the fire will extend beyond his land.

A tradesman may unite with another, for a moiety of the hire acquired upon the work.

IF a fuller, taylor, or dyer, who keeps a public shop, and is possessed of credit, but unskilled in his trade, place any person in his shop who is skilled in the business, with a view that he shall himself procure cloth to be wrought upon, and the person in question work with it, under a condition that a moiety of the recompence or hire shall go to him, this is lawful and valid, as being a *Shirkat Wadjoo*, or partnership upon credit; because, as the shop-keeper procures the cloth to be wrought with upon his own credit, and the person in question works upon it, the ends of both parties are thus completely answered;—neither is the uncertainty with respect to the amount of the time injurious, since that must be in proportion to what is acquired.

Hire of a camel to carry a litter with two persons.

IF a man hire a camel to carry a litter with two persons to *Mecca*, it is valid, on a favourable construction,—and he is at liberty to put upon the camel a litter of the usual dimensions.—Analogy would suggest that a contract of this nature is invalid, (and such is the doctrine of *Shafeï*,) because the quality of a litter, with respect to its length, breadth, and weight, is uncertain, and may possibly occasion disputes. The reason for a more favourable construction of the LAW, in this instance, is that the intent of the rider is merely the conveyance of his person upon the animal, the litter being a subordinate consideration. Besides, as any uncertainty is removed by supposing the litter to be such as is commonly used, there can be no occasion for contention.—The same rule holds, although the owner of the camel should not have seen the carpet and other appurtenances.—It is, however, preferable that he view the litter, &c. as thus uncertainty is removed, and his assent indubitably established.

IF a person hire a camel to carry provisions upon a journey, he is entitled to load the camel with other articles during the journey, in proportion as the provisions are consumed, because, as being entitled to the carriage of a specific load for the whole journey, he is therefore entitled to exact such carriage complete.—The same rule also holds with respect to any thing else besides provisions, provided it be an article of weight, or measurement of capacity.

A sumpter-camel may be loaded with other articles in proportion as the provisions he carries are consumed.

OBJECTION.—It is not customary for travellers to impose any additional load upon an animal in lieu of the provisions they consume upon the way;—and as absolute contracts must be construed agreeably to custom, it would follow that it is not lawful to load the animal with other articles in lieu of the consumed provisions.

REPLY.—Custom admits of either construction, since in some instances it is usual to supply the defect in the article consumed, as in the case of *water*, for instance;—and where custom is various, it is preferable, in absolute contracts, to act agreeably to the requisites of them.

H E D A R A.

B O O K XXXII.

Of MOKATIBS.

Definition of
the terms.

KITABAT, in its literal sense, signifies a slave purchasing his own person from his master, in return for a sum to be paid out of his earnings,—according to the exposition in the *Jama Ramooz*.—(From what occurs in the course of the present work it appears that the literal meaning of *Kitabat* is *junction*, or *union*.)—In the language of the LAW it signifies the emancipation of a slave,—with respect to the rights of possession and action (in other words, the conveyance and appropriation of property) at the time of the contract, and with respect

respect to his person at the time of his paying the consideration of *Kitàbat* *.

Chap. I. Introductory.

Chap. II. Of invalid *Kitàbat*.

Chap. III. Of Acts lawful to a *Mokâtib*, or otherwise.

Chap. IV. Of a Person transacting a *Kitàbat* on behalf of a Slave.

Chap. V. Of the *Kitàbat* of Partnership Slaves.

Chap. VI. Of the Death or Insolvency of the *Mokâtib*; and of the Death of his Master.

CHAP. I.

If a person offer to constitute his male or female slave a *Mokâtib*, in return for a certain property, and the slave assent, it is valid, and the slave becomes a *Mokâtib*.—This transaction is valid, because God has said, in the KORAN, [speaking of slaves,] “GRANT THEM A COVENANT IF YE KNOW GOOD IN THEM;”—which precept, how-

A contract of *Kitàbat* is valid, with the slave's assent.

* This, for the sake of brevity, the translator has in general rendered *ransom*.—The *Molavees* seem to be mistaken in their definition of the *literal* sense of *Kitàbat*, what they state as such being rather the *occasional* than the *primitive* meaning of the term.—*Kitàbat*, in fact, simply means (agreeably to the sense of its root) an *indenture* or *covenant*, whence a *Mokâtib* might with propriety be defined a *covenanted slave*.

ever, is not *injunctive*, but merely *recommendatory*, according to all our doctors.—(By the expression in the text “IF YE KNOW GOOD IN “THEM” is to be understood, according to some, “if ye perceive “that the *Mussulmans* will sustain no injury from them after they “have attained freedom,”—for otherwise it is better that they be not constituted *Mokâtibs*, although it would in such case be nevertheless valid.)—The assent of the slave, however, is a condition of it, because as an obligation for property is thereby incurred, it is therefore requisite that he accede to and undertake such obligation.

A *Mokâtib* is free upon paying his complete ransom;

A MOKÂTIB is not free until he pay his complete ransom, because the prophet has said “*If a slave be made a MOKÂTIB for one hundred “DEENARS, and pay the same, except ten DEENARS, he is still a “SLAVE;*” and he has also elsewhere said, “*A MOKÂTIB is a slave “as long as a single DIRM shall remain against him.*”—It is to be observed, however, that the companions disagreed upon this point; and that the doctrine adopted by our doctors (as here recited) is conformable to the opinion of *Zeyd*.

although this be not expressly stipulated in the contract.

A MOKÂTIB becomes free upon the payment of his ransom, although his master should not have expressly mentioned this in the contract; because the contract requires that freedom be established without being expressly mentioned;—in the same manner as in sale; that is to say, as in sale there is no necessity for the seller saying to the purchaser, “*I constitute you proprietor of this merchandize,*”—so also in the present instance.—Neither is it incumbent [upon the master] to abate any thing from the ransom, in the same manner as, in sale, it is not incumbent [on the purchaser] to abate any thing from the price.—Some have said that it is incumbent that one fourth be abated from the ransom.

The ransom may be stipulated to be

It is lawful to stipulate that the ransom shall be paid down immediately: and it is also lawful that it be deferred,—or, that it be fixed

fixed to be paid in certain proportions at stated periods.—*Shafci* maintains that it is not lawful to stipulate an *immediate* payment, but that it *must* be paid in at least *two lots*, because a *Mokâtib* has it not in his power to pay his ransom at a short warning, since he is incapable of possessing property previous to the contract, as being a slave. It is otherwise in a case of *Sillim* sale. In other words, if a person enter into a contract of *Sillim*, with respect to an article opposed to ten *dirms*, it is lawful (according to *Shafci*) although the person to whom the advance is made be incapable of producing upon the instant the article for which the advance is given, since as he is competent to possess himself of it, it follows that his ability to deliver it is established,—especially as his engaging in the contract argues such ability.—The arguments of our doctors upon this point are threefold.—FIRST, the text of the KORAN, already quoted, evinces that the *Kitâbat* is valid, without any condition of payment in two lots.—SECONDLY, a contract of *Kitâbat* is a contract of exchange; and as the ransom is the thing concerning which the contract is made, it therefore resembles the price of an article of sale, with respect to no condition being made concerning ability of payment.—It is otherwise in a *Sillim* sale, (according to our doctors,) since as the article for which the advance is made is the subject of the contract in that instance, a delay in the delivery of it is indispensable, in order that the person to whom the advance is made may be enabled to produce it.—THIRDLY, as a contract of *Kitâbat* turns entirely upon relief and indulgence, it is evident that the master will be easy with his slave in this particular.—It is otherwise in a *Sillim* sale; because that turns entirely upon tender and acceptance. Besides, if the ransom were stipulated to be immediately paid, and it should happen that the slave was incapable of paying it, still there is no cause of dispute, since, if unable to pay it, he would continue a slave as before, and the contract of *Kitâbat* would be annulled.—It is otherwise in a *Sillim* sale, for as that is not annulled by an incapacity to produce the article for which the advance has been paid, a contention is consequently occasioned.

either prompt
or deferred.

A rational infant may be constituted a *Mokâtib*.

It is lawful to constitute *Mokâtib* an infant slave; provided he know the meaning of purchase and sale; because in that case tender and acceptance exist, as an infant endowed with reason is capable of assenting; and the transaction is advantageous to him.—*Shafëi* differs from our doctors in this instance.—This difference of doctrine is founded on the case of an infant's consent in a transaction of commerce; for if the guardian of an infant give his ward permission to engage in commerce, purchase and sale made by him is valid, according to our doctors, provided the infant understand these transactions; whereas this is invalid according to *Shafëi*.—If, however, the infant in question do not understand purchase and sale, he cannot lawfully be constituted a *Mokâtib*, because as no assent exists in such case, the contract cannot be concluded; and hence if any other person were to pay the ransom on behalf of such infant, still he is not emancipated, and the master must return what that person has so paid him.

Kitâbat is contracted by any address to a slave which suspends his freedom upon the payment of money.

If a person say to his slave, "I give you credit for one thousand *dirms*, which you are to pay to me at various times, so much at one time, and so much at another; and when you have thus discharged the whole, you are free,—but if you be unable to discharge it, you remain a slave,"—such declaration amounts to a contract of *Kitâbat*, since this is the explanation of contracts of *Kitâbat*. If, also, he say, "If you pay me one thousand *dirms*, at the rate of one hundred *dirms* per month, you are free," this likewise is a contract of *Kitâbat*, according to *Abou Soliman*, because a specification of times (namely, of each month) argues an obligation for property, which obligation holds only in virtue of *Kitâbat*.—*Abou Hifz* says that the declaration in question is not a contract of *Kitâbat*, because of its analogy to a suspension of *Kitâbat* upon the payment of one thousand *dirms* at once;—that is, if the master were to say, "Upon paying me one thousand *dirms*, you are free," it is not a contract of *Kitâbat*; and so here likewise.

UPON

UPON the contract of *Kitabat* being concluded, the *Mokâtib* escapes from the possession of his master *, but not from his right of property.—He escapes from his possession, because the intendment of a contract of *Kitabat* is the payment of ransom, which cannot be effected unless the *Mokâtib* be placed out of the possession of his master. The *Mokâtib*, therefore, is empowered to purchase and sell, and may travel although his master should forbid him.—He does not, however, escape from his master's right of property, because of the saying before quoted; and also, because *Kitabat* is a contract of exchange, which rests upon a perfect equality between the parties; and if the *Mokâtib* were to become free upon the instant, equality could not be established; but if his freedom be deferred, this equality is established, because as the slave is, on the one hand, enabled to possess himself of the property requisite to discharge his ransom, the master is thus, on the other hand, enabled to resume possession of him in the event of that not being paid, which he could not do if the slave were free upon the instant of the contract.—As, therefore, the *Mokâtib* does not escape from his master's right of property, it follows that, if the master should in the interim emancipate him, he becomes free in virtue of manumission, since he [the master] is still proprietor of his person:—and in this case the ransom is remitted, as the *Mokâtib* had agreed to the payment of that merely with a view of obtaining his freedom in return, but which he thus procures without it.

The *Mokâtib* escapes from the possession of his master, but not from his property;

Whence the master may still emancipate him gratis.

If a master have carnal intercourse with his *Mokâtibâ*, (or female slave to whom he has granted *Kitabat*,) he is liable to a fine of trespass †; because the slave, in virtue of the *Kitabat*, obtains a right over every part of her own person, in order that the end of *Kitabat*

A master, having carnal connexion with his *Mokâtibâ*, is liable to a fine.

* Literally, "is out of his master's hands," which disables the master from selling or otherwise disposing of him, and from appropriating his earnings, although he still continue his property.

† To be paid to the *Mokâtibâ*.

may

may be answered, which, with respect to the master, is to obtain the ransom, and with respect to the *Mokâtibâ*, to become free in consequence of the contract; and as the *use* of her person stands as an actual part of the person, it follows that she has obtained a right with respect to that also.—If, also, the master commit any offence against the *Mokâtibâ*'s person, or against the persons of her children, he is liable to pay an amercement, for the same reason.—In the same manner, if he destroy any of her property, he must make atonement; because he is as a stranger with respect to her acquisitions; for otherwise he might at any time destroy or consume them, and consequently the design of the contract would be defeated.

CHAP. II.

Of invalid *Kitâbat*.

Kitâbat in consideration of any unlawful article is invalid:

IF a *Musfulman* make his slave a *Mokâtib* in consideration of wine, or a hog,—or in consideration of his value, (by saying to him, “I make you a *Mokâtib* in consideration of your value,”)—the *Kitâbat* is in such cases invalid.—It is invalid in the first instance, because a *Musfulman* can have no claim to wine or a hog, since with him those articles are not property, and consequently they cannot compose a ransom.—It is also invalid in the second instance, because the value is uncertain with respect both to its amount and its quality, since it is unknown whether it be one hundred or two hundred coins, whether those be gold or silver, or whether they be pure or base; and as this

is a wide uncertainty, the contract is therefore invalid; in the same manner as if a person were to make his slave a *Mokátib* in return for undefined cloth, or for an undefined house or animal, in which case the contract would be invalid, and so in the present instance likewise.

If a *Mussulman* make his slave a *Mokátib* in consideration of wine, and the slave pay the same, he is free, according to the *Záhir Rawáyet*.—*Ziffer* maintains that he is not free unless he pay the value of the wine, since it is that which constitutes the ransom in this instance. *Abou Yoosaf* says that the slave becomes free in consequence of paying the wine, merely as it is that which constitutes the ransom in appearance; but that he is also made free by paying the value, as it is that which constitutes the ransom in reality.—*Haneefa* holds that he does not become free in consequence of paying the wine, unless his master should have said to him, “If you pay such wine, you are free,” in which case manumission is suspended upon the condition stated, and consequently the slave becomes free upon the performance of the condition;—in the same manner as in a case of *Kitábat* in consideration of carrion or blood; that is to say, if a person make his slave a *Mokátib* in consideration of carrion or blood, the contract is valid, provided the master should have said “upon paying it you are free;” and he is accordingly emancipated upon paying the blood or carrion; and so likewise in the case in question.—It is to be observed that, in the *Záhir Rawáyet*, no distinction is made between the case of the master saying “If you pay,” (and so forth,) or otherwise.—The distinction between wine or pork, and carrion or blood, is that the former articles are, in effect, property, whence it is possible, in the case of those articles, to have regard to the essence of the contract, which requires that the *Mokátib* be free upon paying the article stipulated;—whereas blood and carrion are not in any shape property, whence it is impossible, in the case of such articles, to have regard to the essence of the contract, and accordingly regard is there had to the essence of the condition,

but the slave is free upon paying the article,

provided this be expressly stipulated in the contract;

which exists where the master expressly declares, in the contract of *Kitabat*, "If you pay it, you are free."

and must perform emancipatory labour to his full value,

or to the value of the article named.

UPON the *Mokatib* becoming free in consequence of paying the wine or pork, it is incumbent upon him to perform *See'ayet*, or emancipatory labour, to his full value; for it is incumbent upon him to return his *person*, because of the invalidity of the contract; but as this is impossible, because of his manumission, it is consequently incumbent on him to pay the *value* of his person;—in the same manner as in a case of invalid sale, where, if the article purchased be lost or expended by the purchaser, it is incumbent on him to pay the seller the value, as he cannot return the actual article.—The slave, therefore, must perform emancipatory labour for his value.—If, however, his value fall short of the value of the article named, he is to perform labour to the amount or value of the article named, and not for his own value; but if, on the contrary, his value exceed the value of the article named, he must perform labour to the amount of his value; for as the contract is invalid, the value it involves is incumbent, to whatever amount, in the same manner as in an invalid sale.—The ground of this is that the master is averse to incurring any loss, as he is averse to granting manumission, unless he can secure the amount which he names.—He, therefore, will not be content with any thing short of what he names. The slave, on the other hand, is content to pay still more, in order that his right (namely, emancipation) may not be annulled.—Hence his value is due, to whatever amount.

OBJECTION.—As manumission is established by the payment of the wine, and cannot be annulled, it would appear that our author's expression "in order that his right may not be annulled," is incorrect.

REPLY.—As, according to the *Zabir Raw'ayet*, the *Mokatib* is not emancipated upon paying the wine or pork, unless the master should have said "if you pay it, you are free," it is possible that the *Kazee* or *Mooftee* may proceed, in their decree, upon some other authority,

in which case the *Mokâtib's* right (to freedom) would be annulled. — Hence the expression “in order that his right may not be annulled,” is perfectly correct.

WHERE a person makes his slave a *Mokâtib* “in consideration of his value,” he is free upon paying such value; for it is that which constitutes the ransom in this instance; and it is possible to have a due attention to the spirit of the contract of *Kitâbat*, by the *Mokâtib* paying to his master property to the utmost extent of his value, which is effected by one person valuing him at thirty *dirms*, (for instance,) one at thirty-five, and one at forty, and none beyond that, and the *Mokâtib* paying forty *dirms*;—this, therefore, is a due payment of his value, which is his ransom.

Where the ransom is stipulated to be the “value” of the slave, he is free upon paying the utmost extent of his estimated value.

OBJECTION.—As the value of the slave is uncertain, in the same manner as the value of undefined cloth, it would follow that this uncertainty ought to operate on the contract, and prevent its validity, so far as that the slave should not be made free by paying his value, in the same manner as a slave is not made free by paying the value of the cloth, in a case where he has been made a *Mokâtib* in return for cloth without an explanation of its qualities.

REPLY.—An uncertainty with respect to the value renders the contract *invalid*, but does not *annul* it.—It is otherwise where the ransom is made to consist of undefined cloth, as that renders the contract totally null, the design of the party being unknown, because of the variety of kinds in cloth; for his design is not to procure *any* cloth, (since his right of property could not be abrogated in virtue of *any cloth whatever*,) but some *particular* cloth, and it is impossible to tell whether the cloth paid by the *Mokâtib* be that particular cloth, or not.—A payment, therefore, cannot be established in this instance, and consequently manumission cannot be established, so long as the design of the master is unknown.

Kitâbat in consideration of another's specific property is invalid,

If a master create his slave a *Mokâtib* in consideration of a specific article, the property of another, it is invalid, as he is incapable of delivering such article.—The compiler of the *Hedâya* remarks, that by a *specific article* is to be understood any thing capable of identification in a contract of exchange; for if the master were to say “I make you a *Mokâtib* in consideration of those thousand *dirms*,” meaning *dirms* the property of another person, it is valid, since as those are not identified in a contract of exchange, the contract of *Kitâbat* is therefore referred to a debt of *dirms*, and is consequently valid.—*Hasan* reports, from *Haneefa*, that in the case in question the contract is valid; whence if the *Mokâtib* become possessed of the article specified, and deliver it to his master, he is free; or if incapable of delivering it, he again becomes an absolute slave as before. The ground of this is, that as the article mentioned is property, and the slave's capacity to deliver it is conceivable, it therefore resembles a dower; that is to say, if a person marry a woman, settling upon her the slave of another, the marriage is lawful, whence if he be able to deliver the slave, he will do so,—or, if not, he will pay the value;—and in the same manner, in the case in question, the contract of *Kitâbat* is valid; with this difference, however, that if capable of delivering the article, he [the *Mokâtib*] will deliver it accordingly; but if not, he will revert to his original state as a mere slave.—But to this it may be replied, that in a contract of exchange the identic article is the object of the contract, the ability to deliver which is essential to a contract of exchange, where it is of a nature that admits the idea of dissolution, such as *sale*. It is otherwise with respect to the dower, in marriage, because as, in marriage, the ability of procreation (which is the end of marriage) is not essential, it follows that ability to deliver a thing which is a mere pendant thereof, (such as the dower,) is not essential, *a fortiori*.

unless that
other signify
his assent.

If a master create his slave a *Mokâtib* in consideration of a specific article, the property of another, and capable of identification, and the proprietor

proprietor afterwards accede thereto, it is recorded, from *Mohammed*, that the contract is lawful; for, as sale is rendered lawful by the assent of the proprietor of the article sold, where that is sold by a stranger, it follows that *Kitabat*, under a similar circumstance, is lawful *a fortiori*, as sale is conducted upon principles of strictness, whereas *Kitabat* is conducted upon liberal principles. It is recorded, from *Haneefa*, that a *Kitabat* of the nature here described is invalid, (according to what is written in the *Mabsoot*,) because, supposing the proprietor of the article not to accede, it is not lawful, for this reason, that the *Mokatib* does not, in virtue of it, become proprietor of his own acquisitions, which is the design, as a *Mokatib* is constituted proprietor of what he can earn, from necessity, that he may acquire property, and therewith emancipate his person; and in a case where the ransom is made to consist of a certain specific article, this necessity does not exist; consequently the contract of *Kitabat* here treated of is invalid;—and as the same reason also exists where the proprietor accedes, in that case also it is invalid. *Aboo Yoosaf* says that the contract is lawful in either case,—that is, both where the proprietor of the article accedes, and also where he does not accede,—with this difference, however, that where he accedes it is incumbent upon the *Mokatib* to deliver to his master the actual article, and where he does not accede, to pay the value of it,—in the same manner as in marriage,—as the reason for the legality of the marriage, namely the validity of the specification, because of the thing specified being property, exists in the present case also. It is recorded, from *Haneefa*, that if the *Mokatib* obtain possession, and make delivery of the article specified, still he is not free; but if his master had said to him, “If you give me such an article, you are free,” he is in this case free, in virtue of the *condition*, not in virtue of the contract of *Kitabat*, for (according to this report) the contract of *Kitabat* was never completely concluded. The same is also recorded from *Aboo Yoosaf*. It is likewise recorded, from him, that the slave is free upon delivering the article, although the master should not have said, “If you give me such an article, you are free,”

because the contract of *Kitabat* has been completely concluded, as the article named is property; it is, however, invalid; and consequently the slave becomes free (not in virtue of the contract, but) in virtue of delivering the article stipulated.

Case of *Kitabat* in consideration of property possessed by a *Mazoon*.

If a master create his slave a *Mokâtib* in consideration of a specific article in his possession, (that is, which has been earned by him in consequence of his being privileged to trade,) there are two reports concerning it, as may be learned from the *Mabsoot*. The compiler of the *Hedaya* observes that he has formerly treated of this point at large in the *Kafayat-al-moontibee*.

A *Kitabat* stipulating the delivery of an unspecified article to the *Mokâtib* is invalid.

If a master create his slave a *Mokâtib* in consideration of one hundred *deenars*, under this condition, that "he shall give to the *Mokâtib* a slave unspecified," the contract is invalid, according to *Haneefa* and *Mohammed*. *Aboo Yoosaf* maintains that it is lawful; and that the hundred *deenars* are divided between the value of the *Mokâtib* and of a medium slave; and the proportion on the value of the medium slave being deducted from the hundred, the *Mokâtib* obtains his *Kitabat* in consideration of the remainder; because, as any slave is capable of constituting a ransom, and (when absolutely mentioned) is calculated at the rate of a medium slave, it follows that he is in the same manner capable of being subtracted from the ransom, as is customary in contracts of exchange. The argument of *Haneefa* and *Mohammed* is that the slave cannot be subtracted from *deenars*, but only his value; and as that is incapable of constituting ransom, because of its uncertainty, so in the same manner it is incapable of being subtracted from the ransom.

Kitabat is valid in consideration of an animal undescribed.

If a master create his slave a *Mokâtib* in consideration of an animal undescribed, it is lawful. The compiler of the *Hedaya* remarks, that it is here understood that the master explains the *species* of the animal, but not his descriptive qualities;—as if he were to say, "I make
6 " you

“you a *Mokâtib* in consideration of a horse,” without mentioning whether he is to be an *Arab* or a *Toorkee*. The contract in question is therefore valid; and the animal named is supposed to mean a *medium* animal of that species; and the master may be compelled to accept of the value;—as has been already fully explained in treating of the dower. Where, however, the species of the animal is not explained, (as if he were to say, “I make you a *Mokâtib* in consideration of an animal,”) it is unlawful; because as animals are of various species, the uncertainty in this instance is very great, whereas if the species be mentioned it is trifling, and a trifling uncertainty may be admitted in a contract of *Kitâbat*, it being considered in the same light with an uncertainty concerning the *term* of a contract of *Kitâbat*;—that is to say, if a person create his slave a *Mokâtib* in consideration of one thousand *dirms*, to be paid at the reaping of the harvest, or at the plucking of the dates, it is lawful; and so also in the case in question.—*Shafëi* maintains that it is unlawful, (and such is what analogy would suggest,) since, as *Kitâbat* is a contract of exchange, it is consequently subject, in this particular, to the same rule as sale.—The argument of our doctors is that a *Kitâbat* is, in the beginning, an exchange of property for what is not property, because, *prima facie*, the consideration (or ransom) is opposed to the removal of restriction, which is not property;—and it is, in the end, an exchange of property for property, because, in the end, the consideration is opposed to the person of the *Mokâtib*,—in this way, however, that the master’s right of property over his [the *Mokâtib*’s] person drops,—for the *Mokâtib* cannot become proprietor of his own person:—hence the contract is (as it were) in effect an exchange of property for what is not property, and consequently resembles marriage.—The reason of and analogy between *Kitâbat* and marriage is, that they both proceed upon liberal principles; in opposition to sale, as that is conducted upon principles of strictness.

Kitabat by an infidel, in consideration of an unlawful article, is valid; and if either party embrace the faith, the value of the article is due;

If a Christian create his slave a *Mokâtib* in consideration of wine, it is lawful, provided the quantity of the wine be specified, and the slave be an infidel, because wine, with respect to infidels, is the same as vinegar with respect to *Mussulmans*.—The contract is therefore valid; and if afterwards either of the contracting parties embrace the faith, the master is entitled to the value of the wine, as *Mussulmans* are prohibited from either making conveyance or taking possession of that article.—The LAW, in this example, is different from that in the case of a *Zimmee* selling wine to another *Zimmee*; for if one of those afterwards become a *Mussulman*, the sale (according to some) is invalid.—The reason of this is that the value of the article named is capable of constituting the ransom, upon the instant of the contract,—(for if a person were to create his slave a *Mokâtib* in consideration of a *Waseef*, or slave-boy, and the slave make a tender of the value, the master may be compelled to accept it,)—and such being the case, it follows that it is also capable of constituting the ransom in the *endurance* of the contract.—A valid sale, on the contrary, cannot be concluded in consideration of the value of the thing named.—Hence there is an evident difference between *Kitabat* and sale.

but the slave is free without the value, if the master take possession of the article.

If a Christian create his infidel slave a *Mokâtib* in consideration of wine of which the quantity is known, and one of the contracting parties become a *Mussulman*, and the master afterwards take possession of the wine, the slave becomes free; for a contract of *Kitabat* possesses the property of a contract of exchange; and consequently, upon the master obtaining one of the two considerations, the slave is entitled to the other, which cannot be obtained without his freedom.

If the slave be a *Mussulman* the contract is invalid.

If a Christian create his *Mussulman* slave a *Mokâtib* in consideration of wine, the *Kitabat* is invalid, although the quantity of the wine be ascertained, because as a *Mussulman* is incapable of undertaking any obligation

obligation for wine, the contract is consequently unlawful.—Notwithstanding this, however, if the slave deliver the wine he is free, for the reasons explained in the beginning of this chapter.

CHAP. III.

Of Acts unlawful to a *Mokâtib*, or otherwise.

IT is lawful for a *Mokâtib* to buy and sell, and to remove from place to place; because it is a requisite of a contract of *Kitâbat* that the *Mokâtib* become free with respect to his actions, in such a degree as may enable him independantly to perform whatever may be necessary towards the attainment of the design, namely, the obtainance of freedom in return for ransom; and of this nature are purchase and sale,—and so likewise journeying from place to place, since it may possibly happen that traffic is not to be found in one particular spot, and consequently that there is a necessity for removing.

A *Mokâtib* may buy and sell; and remove from place to place;

It is lawful for a *Mokâtib* to execute a *Mohabât**, as that is a transaction of traffic, since merchants sometimes buy or sell in the manner of *Mohabât* in one bargain, in order that they may derive a profit upon some other bargain.

and execute a *Mohabât*.

* *Mohabât* means buying an article at an *over-value*, or selling it at an *under-value*, which is sometimes done with a view to induce the party to engage in some other transaction of a more advantageous nature. It is fully treated of elsewhere.

He may leave a place, although his master have stipulated otherwise.

If the master make it a condition with his *Mokâtib* that he shall not go forth from such a particular place, (*Koofa*, for instance,) still he is at liberty to go forth from thence, on a favourable construction of the LAW,—because a contract of *Kitâbat* requires that the *Mokâtib* be enabled independantly to possess himself of what he is to give as a ransom, and that he have full power and title with respect to his own person, and the advantage to be obtained from his personal exertions. Now the condition in question is repugnant thereto. It is consequently null; but the contract is valid, because the virtue of that cannot be effected by a condition of the nature here described.—Besides, a contract of *Kitâbat* cannot be rendered invalid by the insertion of such a condition; because *Kitâbat* resembles sale, and it also resembles marriage: the contract in question is therefore referred to sale in all cases where the insertion of an invalid condition tends to invalidate the contract;—(as where, for instance, the master stipulates for an uncertain service, by saying to his slave, “ I create you a *Mokâtib* in “ consideration of your serving me *for a time*,”—which condition affects the virtue of the contract, as the ransom is here made to consist of service for an indefinite term;)—and it is referred to marriage in all cases where the insertion of an invalid condition does *not* tend to invalidate the contract;—and it is customary, in practice, to proceed on either resemblance.—Besides, a contract of *Kitâbat* is a manumission on the part of the slave, as being a destruction of the property in him; and as the condition in question (that he shall not go forth from *Koofa*) is connected with the slave, the contract is accordingly a manumission with respect to that condition; and manumission is not annulled by the insertion of an invalid condition.

He cannot marry without the consent of his master.

It is not lawful for a *Mokâtib* to marry without the consent of his master; because a contract of *Kitâbat* operates to the removal of restriction, (under this qualification, that the *Mokâtib* still continue the property of his master,) in order that it may be a means of accomplishing the design; and marriage is not a means of accomplishing the design,

design, as it is not an acquisition of property, but rather occasions the *Mokâtib* to be employed in discharging his wife's dower, and providing her maintenance. His marriage is therefore unlawful without his master's consent; but it is lawful if he consent, since he is empowered in this particular.

It is not lawful for a *Mokâtib* to bestow gifts or alms, except a trifle; because gift and alms are gratuitous acts; and he is not possessed of any property in an *absolute* manner, so as to be capable of conveying it.—The conveyance, however, of trifling matters is incidental to traffic; for it is necessary that he make entertainments and grant loans, in order to draw wealthy merchants about him; and a person who is empowered with respect to any thing, (such as *trade*,) is also empowered with respect to its necessary incidents.

He cannot bestow gifts, or alms,

It is not lawful for a *Mokâtib* to become bail; because bail is an act peculiarly gratuitous, being neither necessarily incidental to commerce, nor to the acquisition of property.—It is therefore unlawful for him to become bail, whether for the person or for property, as both species of bail are gratuitous.

or become bail,

It is not lawful for a *Mokâtib* to grant a *Karz* loan, because that also is a gratuitous act not necessarily incidental to the acquisition of property.—If, therefore, a *Mokâtib* make a gift of any thing, under condition of receiving something in return, it is disapproved, as this is *prima facie* a gratuitous act.

or grant a *Karz* loan.

If a *Mokâtib* contract his female slave in marriage, it is lawful, as being an acquisition of property, because in consequence of so contracting her, he obtains possession of her dower.—The contract of *Kitabat*, therefore, comprehends this.

He may contract his female slave in marriage;

or create his
[male or fe-
male] slave a
Mokâtib;

If a *Mokâtib* create his slave a *Mokâtib*, it is lawful, on a favourable construction. Analogy would suggest that it is unlawful, (and such is the opinion of *Ziffer* and *Shafëi*,) because *Kitabat* leads to manumission, with respect to which he is not empowered;—in the same manner as manumission for a compensation; that is to say, as, if a *Mokâtib* were to say to his slave, “I emancipate you in consideration of one thousand *dirms*,” it is invalid, it would consequently follow that his making his slave a *Mokâtib* is also invalid. The reason for a more favourable construction, in this particular, is that a contract of *Kitabat* is a contract for the acquisition of property, wherefore the *Mokâtib* is empowered with respect to the point in question, in the same manner as with respect to contracting his female slave in marriage, or with respect to sale.—Making his slave a *Mokâtib*, moreover, may on some occasions be more advantageous than sale, because his right of property is not destroyed by the *Kitabat* until he have obtained the consideration for it,—whereas his right of property is destroyed by sale before he has obtained the price for the article sold,—whence it is that a father or executor are at liberty to enter into a contract of *Kitabat* with the slave of their infant ward. As, therefore, a *Mokâtib* may lawfully create his slave a *Mokâtib*, it follows that, in consequence of the contract of *Kitabat*, his slave is endowed only with every right with which he is himself endowed. It is otherwise in manumission for a compensation; because in virtue of that the slave is endowed with that with which the *Mokâtib* is not himself endowed; since in consequence of manumission for a compensation the slave is free upon the instant,—whereas the *Mokâtib*, in consequence of the contract of *Kitabat*, only becomes eventually entitled to freedom, but is not free upon the instant.

(in which case
the *Willa* of
such *Mokâtib*
rests with the
first *Mokâtib*'s
master.)

If the *Mokâtib* of a *Mokâtib* pay his ransom before the *Mokâtib* shall have himself become free, the *Willa* appertains to the master of the *Mokâtib*, because the property of him vests in one shape in the master.—Besides, as the manumission of the *Mokâtib*'s *Mokâtib* may lawfully

lawfully be referred to the master of the *Mokatib* on the instant of the contract, it follows that where it is impossible to refer it to the contracting party himself, because of his incompetency, it must be referred to his master;—in the same manner as holds with respect to a slave licenced to trade; that is to say, if a slave licenced to trade purchase any thing, the property thereof vests in his master, as it cannot vest in the slave, since he is incapable of possessing property.—If, also, the *Mokatib* should afterwards discharge his ransom, and become free, still the *Willa* of his *Mokatib* does not shift to him, because his master had already been constituted the emancipator, and *Willa* cannot shift from the emancipator.—If, on the contrary, the *Mokatib's* *Mokatib* pay the ransom to the *Mokatib* after he [the first *Mokatib*] has obtained his freedom, the *Willa* [of the second *Mokatib*] rests with him [the first *Mokatib*,] because in this instance the party to the second contract of *Kitabat* is capable of having a right of *Willa* established in him. Besides, he is the original, or (in other words) the *personal* emancipator, and is consequently entitled to the *Willa*.

If a *Mokatib* emancipate his slave in return for property, or sell his slave into his own hands, or contract him in marriage, it is unlawful, as none of these acts are either an acquisition of property, or an appurtenance to acquisition of property:—the first (namely, emancipation in return for property) is not so, because that is a dereliction of right of property in the slave's person, and the establishment of it is a debt upon one who is poor; nor is the second so, because that is also, in effect, a manumission in return for property; neither is the third so, because the act of contracting the slave in marriage vitiates and diminishes his value, and causes him to be occupied in discharging the debt of dower, and providing his wife a subsistence:—in opposition to contracting a *female* slave in marriage, as that is an acquisition of property, since by it the dower is obtained, as was before explained.

He cannot emancipate his slave for a compensation; or contract his *male* slave in marriage:

(and the same
rule holds
with respect
to a guardian,

A FATHER or executor* stand, with respect to their infant ward, in the same predicament as a *Mokâtib* with respect to his slave;—that is to say, it is unlawful for them to contract the [male] slave of their ward in marriage, or to emancipate him, or to sell him into his own hands. But it is lawful for them to contract in marriage his *female* slave, or to enter into a contract of *Kitâbat* with his male or female slave, because it is lawful for them to acquire property on behalf of their infant ward in the same manner as a *Mokâtib*; and also, because contracting his female slave in marriage, or making his male or female slave *Mokâtib*, is conducive to his interest, whereas any thing beyond this is not so; and their authority is established in regard to their ward with a view to his interest.

or a licensed
slave.)

A MAZoon, or slave licenced to trade, cannot lawfully perform any of the acts above described; that is to say, he can neither contract his male or female slave in marriage, nor make his slave a *Mokâtib*, nor emancipate him in return for property, nor sell him into his own hands.—This is according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* maintains that he is at liberty to contract his *female* slave in marriage.—The same difference of opinion obtains with respect to a *Mozâribat* manager, a partner under partnership by reciprocity, and also a partner under partnership in arts; for *Abou Yoosaf* conceives an analogy between those and a *Mokâtib*; and as a *Mokâtib* is at liberty to contract his female slave in marriage the same is lawful to these likewise.—He, moreover, conceives an analogy between contracting a female slave in marriage, and letting her out to hire;—that is to say, as it is lawful for a *Mazoon*, a *Mozâribat* manager, &c. to let their female slave to hire, so in the same manner it is lawful for them to contract her in marriage, because contracting her in marriage and letting her out to hire are both equally causes of advantage.—The argu-

* The term *Waffee*, in this place, signifies a guardian appointed by will; in opposition to a *Wallée*, or natural guardian.

ments of *Haneefa* and *Mohammed* upon this point are twofold. FIRST, the slave in question is merely empowered to trade, and contracting his female slave in marriage is not a transaction of trade, because trade is an exchange of property for property, and contracting in marriage is not of this nature, since the connubial enjoyment is not property, evidently.—Contracting in marriage, therefore, resembles *Kitàbat*; and as they are not empowered to make a slave *Mokâtib*, so in the same manner they are not empowered to contract a female slave in marriage. A *Mokâtib*, on the contrary, is empowered to acquire property; and the contracting his female slave in marriage is one mode of acquiring property.—SECONDLY, contracting a female slave in marriage is an exchange of property for what is not property. It therefore resembles *Kitàbat*, and not *hire*, as that is an exchange of property for property, since usufruct, in hire, stands in the place of property. It being therefore proved that contracting a female slave in marriage resembles *Kitàbat*, and a contract of *Kitàbat* being unlawful to the slave in question, it follows that contracting his female slave in marriage is likewise unlawful to him.

SECTION.

If a *Mokâtib* purchase his father or his son, they are included in his *Kitàbat*;—that is to say, they become *Mokâtibs* dependantly;—because, as a *Mokâtib* possesses capacity to make a *Mokâtib*, although he be not capable of granting emancipation, they therefore are rendered *Mokâtibs*, in order that the ties of kindred may be as far as possible preserved; for as, if their relation, being a freeman, were to become possessed of them, they would also become free, in consequence of a freeman being empowered to bestow manumission upon his slave, so in the same manner they in the present instance become *Mokâtibs*, in consequence.

The parent or child of a *Mokâtib*, purchased by him, are included in his *Kitàbat*;

consequence of the *Mokâtib* in question being empowered to create his slave a *Mokâtib*.

but relations
not within the
degree of pa-
ternity are not
so included.

IF a *Mokâtib* purchase a kinsman related to him within the prohibited degrees, but not within the degree of paternity, he is not included in his *Kitabat*, according to *Haneefa*.—The two disciples allege that he also is included in his *Kitabat*, in the same manner as a paternal relation, as the obligations of kindred extend equally to both, whence it is that the prohibited relation of a freeman becomes free upon being purchased by him.—The arguments of *Haneefa* upon this point are twofold.—FIRST, a *Mokâtib* is empowered with respect to the acquisition of property, but not with respect to the property acquired.—The power he enjoys, however, of acquiring property, suffices for the performance of the duties of paternity, whence it is incumbent upon a person enabled to acquire property, to afford subsistence to his parents and children,—but it does not suffice for the performance of any other than the duties of paternity, whence the subsistence of a brother is not incumbent except upon a wealthy brother.—SECONDLY, the fraternal affinity is a medium between the avuncular which is distant, and the paternal which is near; and it is accordingly referred to the paternal with respect to freedom, and to the avuncular with respect to *Kitabat*;—and this arrangement is preferable to the reverse, because manumission is more extensive in its operation than *Kitabat*, inasmuch that if one of two partners make his share in a slave *Mokâtib*, the other partner is at liberty to annul it,—whereas if one were to *emancipate* his share, the other could not annul it.

His child,
born of his
Am-Walid, is
included; and
the *Am-Walid*
cannot be
sold.

IF a *Mokâtib* purchase his *Am-Walid*, (that is, his wife, whom he married when she was the slave of another, and who has borne a child to him,) his child born of her is included in his *Kitabat*, and it is unlawful for him to sell the *Am-Walid*.—The child becomes a *Mokâtib*, because of what was before said “ in order
“ that

“that the ties of kindred may be as far as possible preserved:”—and the mother cannot lawfully be sold, as she is a dependant of her child in effect, the prophet having said (speaking of an *Am-Walid*) “*her child bath set her free.*”—What is here advanced proceeds on the supposition that the *Mokâtib* becomes proprietor of the *Am-Walid*, together with her child. If it be otherwise, he having purchased her alone, in that case also the same effect obtains, according to *Abou Yoosaf* and *Mohammed*, because of her being his *Am-Walid*: in opposition to *Haneefa*, who contends that she may in this case be lawfully sold; because analogy suggests that the sale of her is lawful notwithstanding he become possessed of her along with her child; for the right over property of a *Mokâtib*'s earning is suspended, (since, if he pay his ransom, it becomes appropriated to him, or if he fail in this, it becomes appropriated to his master,) and such being the case, no right incapable of dissolution can be connected with it, for if so, it would follow that such right is annulled upon the *Mokâtib* failing to pay his ransom; and the prohibition against selling her, on account of her being an *Am-Walid*, is incapable of annulment. The right in question, however, is established with respect to her, dependantly, in a case where he becomes possessed of her together with her child, because of that right being established with respect to the child; whereas if it were established independant of the child, it would follow that the right in question is established with respect to her *prima facie*, to which analogy is repugnant.

If a child be born to a *Mokâtib*, by his female slave, it is included in his *Kitâbat*, for the reason assigned in the preceding example; and the child becomes subject to the same rules with the *Mokâtib*. The earnings of the child are therefore the earnings of the *Mokâtib*, as being the earnings of the *Mokâtib*'s earnings; wherefore the *Mokâtib*'s exclusive right to those earnings cannot be affected by any claim which may be afterwards set up to them.

His child, born of his slave, is also included; and its earnings appertain to him.

The child of a *Mokâtibâ* is included in her *Kitâbat*, and cannot be sold.

If a *Mokâtibâ* bear a child to her husband, such child is included in her *Kitâbat*; and the sale of it is unlawful, because as the right of being unfaleable is established with respect to the *Mokâtibâ*, it consequently extends to her child, in the same manner as *Tadbeer* or *Isfeelad*. (The case of *Isfeelad*, here alluded to, is where a person contracts his *Am-Walid* in marriage to another, and she bears a child,—in which case that person cannot lawfully sell the child, as the unfaleableness of the *Am-Walid* extends to her offspring.)

A child begot by a *Mokâtib* upon a *Mokâtibâ*, is included in the *Kitâbat* of the mother.

If a person contract his female slave in marriage to his male slave, and afterwards create them both *Mokâtibs*, and they have a child, it is included in the *Kitâbat* of the mother, and its acquisitions appertain to her; because the dependance on the mother has the superiority, as the qualities established in the mother extend to her offspring; and accordingly, a child is a dependant of its mother with respect to *bondage* and *freedom*.

The children of a *Mokâtib* by a woman who proves a slave are slaves, and cannot be demanded by him.

If a *Mokâtib* marry, with the consent of his master, a woman who declares herself free, and they have children, and the woman be afterwards claimed as a slave, their children are in such case slaves*, and the father is not entitled to demand them for their value; and so likewise, if a *slave* marry, with the consent of his master, a woman under such circumstances. This is according to *Haneefa* and *Aboo Yoosaf*. *Mohammed* alleges that the children are free for their value; in other words, the father is entitled to take them upon paying their value, and they then are free; the reason of which is, that as the slave or *Mokâtib* married the woman purely under the idea that his children should be free, they are therefore in the same predicament with the slave of a *Magroor*, or person acting under a deception. The argument of the two disciples is, that as the children in question are the offspring of *two slaves*, (for their father and mother are both

* To the owner of the mother.

slaves,)

slaves,) it follows that they also are slaves.—The ground of this is that it is a rule that a child is a dependant of its mother with respect to bondage and freedom.—This rule is, however, abandoned in the case of a free person acting under a deception, by all the companions. But a slave or a *Mokatib*, acting under a deception, are not in the precise predicament with a free person so acting; because, where the person who acts under a deception is free, he may be sued for the value of his child upon the instant, (according to *Mohammed*,) whereas a *Mokatib*, *Modabbir*, or slave so circumstanced, in case of having married without their owner's approbation, cannot be sued for the value of their child until after they have themselves become free.—As therefore a slave or a *Mokatib*, acting under a deception, are not in the precise predicament with a free person so acting, it follows that their child must not be confounded with the child of a deceased free-man, but continues in its original state.

If a *Mokatib* have carnal connexion with the female slave of another, in virtue of a supposed right of bondage, without the consent of her master, (in this way, that he purchases a slave, and cohabits with her, and the slave afterwards proves the property of another,) he must in this case pay * an *Akir*, or fine of trespass, to the value of her proper dower, and is liable to be sued for it during the term of his *Kitabat*. If, on the contrary, he had cohabited with the slave in virtue of marriage †, he could not be sued for the fine until he had obtained his freedom. A *Mazoon*, or slave licensed to trade, is also subject to the same rule. The difference between a case of cohabitation in virtue of a right of bondage and in virtue of marriage is, that in the former case a debt is established with respect to the master; because a contract of *Kitabat* comprehends traffic and its incidents; and the fine is an incident of traffic, and must be referred thereto; for if the *Mokatib* had not purchased the slave, he could not escape punish-

Case of a
Mokatib co-
habiting with
the slave of
another
without his
consent.

* To her master.

† Without the consent of her owner.

ment, since where punishment is not remitted the fine is not due: hence the fine is regarded as a *debt of trade*. In the *second* case, on the contrary, the debt is not established with respect to the master; because in this instance the obligation of the fine is on account of an erroneous marriage; and as marriage is neither a branch of traffic nor a means of acquiring property, it is not comprehended in a contract of *Kitabat*, in the same manner as *bail* is not comprehended therein.—The payment of the fine, therefore, in this instance, is delayed until the *Mokatib* shall have become free; in the same manner as, if a *Mokatib* enter into a contract of bail, he cannot be sued upon it until he have obtained his freedom, bail not being a branch of traffic.

If a *Mokatib* purchase a female slave by an invalid contract, and cohabit with her, and then return her to her owner, he may be sued for the fine during his *Kitabat*; and the same of a *Mazoon*, or slave licensed to trade; because this is a circumstance appertaining to traffic; and transactions are sometimes valid and sometimes invalid; and *Kitabat* and license to trade comprehend both valid transactions and invalid; in the same manner as agency;—in other words, if a person appoint another his agent for purchase or sale, (for instance,) the agency comprehends both valid and invalid purchase or sale; and so also in the present instance.—The transaction is therefore established as affecting the master.

SECTION.

A *Mokatibá*, bearing a child to her master, may undo the contract, and

If a female slave, having been made a *Mokatibá*, bear a child to her master, she has it at her option either to adhere to the contract of *Kitabat*, or to incapacitate herself from paying ransom, and to become an *Am-Walid* to her master; because here exists two causes of freedom,

dom, in virtue of one of which freedom may be obtained immediately, but for a consideration,—and in virtue of the other it may be obtained after delay, but without any consideration.—She has therefore an option of either.—The parentage of her child is moreover established in the master, and the child is consequently free, although it be an acquisition of the female slave; because the claim laid to it by the master is tantamount to manumission; and as the master has it in his power, without any particular motive, to emancipate the child where it is *not* sprung from him, it follows that he is entitled, *a superiori*, to emancipate it under a claim; and the master's right of property, existing with respect to the slave, suffices for the purpose of rendering valid *Isfelád* under a claim. It is to be observed that if the female slave in question adhere to her contract of *Kitábat*, she is entitled to a fine of *Akir* from her master, because her person and the use of it are her exclusive right, as was before explained.

become his
Am-Walid:

If the *Mokátibá*, in the above example, adhere to the contract of *Kitábat*, and her master die, she becomes free, as being his *Am-Walid*; and her ransom is remitted. If, on the contrary, she should die, and leave property, her ransom is paid out of that property, and whatever remains goes to her child, in virtue of inheritance, according to the intendment of the contract. If, however, she leave no property, yet her child is not required to perform emancipatory labour, as it is free at all events.

or, if she adhere to the contract, she nevertheless becomes free upon his decease, without ransom.

If the *Mokátibá* mentioned in the above example bring forth *another* child, it is not incumbent upon the master to father it; because it is not lawful for him to have carnal connexion with her.—If, therefore, the master should not claim this child, and she die, without leaving effects to discharge her ransom, this child must perform emancipatory labour, as being a *Mokátib*, in consequence [as a dependant] of the mother.—If, however, the master afterwards die, the child is free, and is excused from emancipatory labour, as standing in the

If she bear a second child, and die insolvent, this child must perform emancipatory labour, unless the master father it.

predicament of an *Am-Walid*; for it is the offspring of an *Am-Walid*, and consequently partakes of her privileges as a dependant of her.

An *Am-Walid*
may be con-
stituted a *Mo-*
kâtibâ;

IF a master enter into a contract of *Kitâbat* with his *Am-Walid*, it is lawful; because she is here desirous of obtaining her freedom *before* the decease of her master, and this end is obtained by means of a contract of *Kitâbat*: neither is her being an *Am-Walid* at all repugnant to the contract of *Kitâbat*, since both those means of freedom may unite in her, and she may obtain her freedom, in virtue of the one immediately, by the payment of her ransom,—or, in virtue of the other, after a delay, independant of ransom.—The contract in question is therefore valid.—But if her master afterwards die, she becomes free in virtue of being an *Am-Walid*, as her freedom was suspended upon his decease:—and in this case she is excused from the ransom; because her design, in entering into the contract, and engaging for a ransom, was merely to procure her freedom upon paying it; but as she here becomes free *before* having paid it, it is impossible for her to acquire freedom *upon* paying it, since a thing already obtained cannot be obtained again.—Her ransom therefore drops, and the contract of *Kitâbat* becomes null, as its continuance is in this case useless.

OBJECTION.—As the contract of *Kitâbat* is annulled and broken off by the master's decease, it would follow that the acquisitions of the *Mokâtibâ*, together with the children not begotten by her master, and born during the *Kitâbat*, appertain to the master's estate;—whereas it is not so.

REPLY.—The contract of *Kitâbat* is annulled with respect to the ransom, but remains in force with respect to the acquisitions and children of the *Mokâtibâ*; because the annulment of the contract is out of tenderness to her interest, which is observed in annulling it with respect to the ransom, but not with respect to those other particulars, for if it were annulled with respect to them, it would follow that they became the property of the master's heirs.

If

IF a person enter into a contract of *Kitàbat* with his *Modabbirâ*, it is lawful, for the reason assigned in the preceding example, that "she" is desirous of obtaining her freedom *before* the decease of her "master:"—neither is her being a *Modabbirâ* repugnant to the contract of *Kitàbat*; for she is not, in virtue of *Tadbeer*, free at *present*, but is merely endowed with a right to *ultimate* freedom, upon the decease of her owner. If, in this instance, the master die, leaving no property except the *Modabbirâ* in question, she has it at her option to perform emancipatory labour, either for two thirds of her estimated value, or for the whole of her ransom. This is according to *Haneefa*. *Aboo Yoosaf* holds that she is to perform emancipatory labour to a degree equivalent to the least of the two.—*Mohammed* maintains that she is to perform emancipatory labour to the amount of what is least, two thirds of her value, or two thirds of her ransom. Thus there is a difference of opinion with respect both to the *amount* and the *option*; and *Aboo Yoosaf* coincides with *Haneefa* in regard to the one, and with *Mohammed* in regard to the other. The right of option, in this instance, is derived from the divisibility of manumission, as maintained by *Haneefa*; because as (according to him) manumission admits of being divided into parts, one third of the *Modabbirâ* becomes free on the instant, and two thirds continue in bondage;—and as two causes of manumission operate, with respect to the other two thirds, for two different considerations, (one of which is of immediate effect, in virtue of *Tadbeer*, and the other of deferred effect, in virtue of *Kitàbat*,) the *Modabbirâ* has therefore an option of either. According to the two disciples, on the contrary, manumission is indivisible. Hence the *whole* of the *Modabbirâ* is free in consequence of a *part* of her being so; and she, as being consequently free, owes one of the two considerations, of which she will undoubtedly prefer paying that which is the *smallest*. Her having an option is therefore useless.—With respect to the point on which *Mohammed* differs both from *Haneefa* and from *Aboo Yoosaf*, namely the amount, the argument he urges is that the master had opposed the whole ransom to the whole of the *Modabbirâ*'s person; but she has already secured

And the same
of a *Modab-*
birâ.

cured to herself *one* third of the whole in virtue of *Tadbeer*, and it is consequently impossible that any ransom should be due for that third; for as, if she had secured her *whole* person to herself, by that constituting only a third of the deceased's property, the whole of her ransom would have been remitted, it follows that one third is remitted in the present instance;—in the same manner as where a master first makes his slave a *Mokâtib*, and then grants him *Tadbeer*,—in which case one third of his ransom is remitted,—and so likewise in the case in question.—The argument of the two *Elders* is that the whole of the *Kitâbat* is opposed to two thirds of the *Modabbirâ*, and consequently no part of it can be remitted. The ground of this is that the ransom, although it be opposed to the *whole* of the *Modabbirâ* in regard both to *appearance* and *letter*, is nevertheless restricted to two thirds of her in regard to *reality* and *design*; because she has already become, in appearance, entitled to the freedom of one third of her person; and it is evident that men do not engage for property, as opposed to a thing to the freedom of which they are already entitled;—as, for instance, if a person pronounce two divorces upon his wife, and afterwards agree “to give her three divorces for one thousand *dirms*,” the whole thousand are opposed to the one remaining divorce required to make up that number, because apparent circumstances argue that such is his design, since only one divorce remains to be given;—and so likewise in the present instance.—It is otherwise where a master first creates his slave a *Mokâtibâ*, and afterwards grants her *Tadbeer*, for in that case the ransom was opposed to her *whole* person, as she was not at the time of concluding the contract of *Kitâbat*, entitled to the freedom of any part of her person.—There is therefore an evident difference between the cases.

A *Mokâtibâ*
may be con-
stituted a *Mo-*
dabbirâ.

If a person grant *Tadbeer* to his *Mokâtibâ*, it is lawful; because she stands in need of freedom; and her becoming a *Modabbirâ* is not repugnant to the contract of *Kitâbat*, as was before stated. In this case the slave has it at her option either to adhere to the contract of *Kitâbat*, or to incapacitate herself from paying ransom, and to become

come a *Modabbirh*, because a contract of *Kitâbat* is not binding on the part of a slave*. If, therefore, she adhere to the contract, and her master die, and leave no property besides, she has it at her option to perform emancipatory labour, either for two thirds of her ransom, or for two thirds of her estimated value.—This is according to *Haneefa*. The two disciples maintain that she has no option, but is to perform emancipatory labour for that which is the least of the two. Thus the difference, in this case, concerns only the *option*, in consequence of that being derived (according to *Haneefa*) from the divisibility of manumission, as before set forth; for they all agree concerning the *amount*, since in this instance the ransom is opposed to the *whole* of the slave's person, as was explained above.

If a master grant manumission to his *Mokâtib*, he is accordingly free, because the master is proprietor of his person, and therefore possesses the power of emancipating him:—and in this case the ransom is remitted from the *Mokâtib*; because he engaged for it solely as opposed to his emancipation; but as that has been obtained without ransom, it is consequently not due.

A *Mokâtib*
may be eman-
cipated *gratis*.

OBJECTION.—It would here appear that the *Mokâtib* is not free, as the contract of *Kitâbat* is binding on the part of his master.

REPLY.—Although the contract of *Kitâbat* be binding on the part of the master, yet it may be broken with the consent of the *Mokâtib*; and it is evident that the *Mokâtib* consents to the breach of it in the present instance, in order that he may be emancipated without paying ransom. Notwithstanding this, however, his acquisitions remain secured to him; because the contract is annulled only with respect to the ransom, out of tenderness to his interest.

* That is to say, a slave is at liberty to break off, or fail in, the fulfilment of a contract of *Kitâbat*, although the master have not this liberty.

An abatement may be made from the ransom, in consideration of prompt payment.

IF a person create his slave a *Mokâtib*, in consideration of one thousand *dirms*, on a credit of one year, and afterwards enter into a composition with him for five hundred *dirms* prompt payment, it is lawful, on a favourable construction. Analogy would suggest that it is unlawful, because it would hence appear that the master had in this instance opposed one thousand *dirms* to five hundred *dirms*, and credit for one year, which, as credit is not property, and as the debt of ransom is property, would be usurious;—whence it is that a transaction of the nature here described is not lawful with respect to a freeman, or the *Mokâtib* of a stranger;—that is to say, if a person have a deferred debt owing to him from a freeman, and compound with him for one half of his right, prompt payment, it is unlawful;—and in the same manner, if a person have a deferred debt owing to him from the *Mokâtib* of a stranger, and compound with him on the same terms, it is also unlawful. The reasons, however, for a more favourable construction of the law in this particular are twofold.—FIRST, the credit granted to the *Mokâtib*, although in one shape it be not property, yet is in another shape property; for as the *Mokâtib* is unable to pay his ransom but by means of the credit, it follows that the credit is virtually property with respect to him. The ransom, on the other hand, although it be property in one shape, yet is not so in another shape, inasmuch that bail cannot be given for it.—The credit, therefore, stands upon the same footing with the ransom:—consequently, the transaction was only the acceptance of a consideration of what was property in one shape in return for what was also property in one shape; and as the consideration and the return were of different kinds, there was therefore no usury in it.—SECONDLY, A contract of *Kitâbat* is a contract in one shape;—but it is not so in another shape; because a master cannot have a claim for debt upon his slave, and also because it [the contract] has a semblance to *Yameen*, or conditional vow, as it is a suspension of emancipation upon the payment of a consideration.—The sum of five hundred *dirms*, also, opposed to the credit, is usury in one shape but not in another, for if the credit granted

granted be not accounted property, it is usury,—whereas if the credit be accounted property, usury is not induced, since in such case it is merely property opposed to property. The usury, therefore, is at all events dubious; and where dubious usury occurs in a contract which is itself of a dubious nature, it is *doubly* dubious, and consequently is not regarded.—It is otherwise in a contract between two freemen, as that is in every shape a contract, and consequently the circumstance of a credit being granted in it occasions a semblance of usury.

If a sick person * enter into a contract of *Kitabat* in consideration of two thousand *dirms*, on a credit of one year, with his slave whose value is *one* thousand, and afterwards die, leaving no other effects but this slave, and the heirs of the deceased had not acceded to the credit granted, in this case he [the slave] must pay two thirds of his *Kitabat* immediately, and agree to pay the remainder within the term of credit, or he again becomes an absolute slave.—This is according to *Haneefa*.—According to *Mohammed* he must pay two thirds of *one* thousand immediately, and the remainder within the term of credit; because as it would have been lawful for the master to have remitted the remainder altogether, by making the slave a *Mokâtib* in consideration only of his *value*, it follows that he was at liberty to postpone it to the term of credit specified;—in the same manner as where a sick person enters into an agreement of *Khoola* with his wife, in consideration of one thousand *dirms*, on a credit of one year, and dies, leaving no property except those thousand *dirms*, and his heirs had not acceded to the credit granted the wife;—for in this case the credit is nevertheless valid with respect to the whole sum mentioned; because as the deceased was at liberty to have pronounced a divorce upon his wife without receiving any consideration, it was consequently in a superior

A credit granted with respect to the ransom, without the consent of the master's heirs, expires upon his decease; and the *Mokâtib* must pay them two thirds of it immediately;

* Arab. *Mareez*;—always (in the language of the LAW) meaning a *dying* person. The case here considered turns entirely upon the general rule, that a dying person is not at liberty to perform any act which might have a tendency to affect the right of his heirs, beyond *one third* of his estate.

degree lawful for him to postpone the payment to the term of credit specified.—The argument of the two *Elders* is, that the sum in question (namely the two thousand) is the consideration for the *whole* of the slave's person, whence it is that the laws concerning considerations obtained with respect to it;—and as the right of the heirs is connected with the return, namely, with the slave's person, so it is in the same manner connected with the consideration for the person.—Now agreeing to postpone the consideration is in one shape a dereliction; and it is therefore regarded as applying to one third of the whole property named. It is otherwise in the case of *Kboola*; because as, in that case, the consideration is not opposed to property, the right of the heirs is not connected with the return, namely, the use of the woman's person, whence it is that their right is also unconnected with the consideration for it.—Analogous to the difference of opinion in the present instance, is that which obtains in the case of a sick person selling his house, valued at one thousand *dirms*, for three thousand, on one year's credit, and then dying, and leaving no effects except the price abovementioned;—for in this case, according to the two *Elders*, the purchaser must be required to pay down two thirds of the whole price immediately, and the remainder within the time promised, or to dissolve the contract of sale;—whereas, according to *Mohammed*, regard is had to the third of the *value*, not to the third of what *exceeds* the value;—the reasons of which have been explained above.

or two thirds
of his *value*,
if the ransom
fall short of
that.

If a sick person make his slave, valued at two thousand *dirms*, a *Mokatib* for one thousand, on a credit of one year, and then die, leaving no property except the *Mokatib*, and the heirs do not confirm the credit, he [the *Mokatib*] must pay down two thirds of his value immediately, or he again becomes an absolute slave, according to all our doctors; because as this case involves a *Mohabat* with respect both to the slave's value and to the credit granted, regard is therefore had to one third with respect to both.

CHAP. IV.

Of a Person transacting a *Kitabat* on behalf of a Slave.

IF a freeman agree to a contract of *Kitabat* on behalf of a slave, on a consideration of one thousand *dirms*, in this case, provided he pay those thousand on behalf of such slave, he [the slave] is free; or, if the slave receive intelligence of the contract, and accede to it, he becomes a *Mokatib*. The nature of this case is that a free person says to the master of a slave, "make your slave a *Mokatib*, in consideration of one thousand *dirms*, on this condition, that if I pay you the said thousand, he shall be free,"—and the master accordingly makes his slave a *Mokatib*,—in which case he [the slave] is made free by the freeman in question paying the money, agreeably to stipulation:—and if the slave accede upon receiving intelligence of the transaction, he becomes a *Mokatib*, because the contract was suspended upon his consent, and his acquiescence is consent.—If, in this case, the freeman in question were not to add, as above, "on this condition, that if I pay you the said thousand, he shall be free," and afterwards pay the money, still analogy would suggest that the slave is not thereby emancipated, because in this instance no stipulation has been made for his freedom, and the contract is suspended, in its effect, upon his consent. He is, however, emancipated in this case also, on a favourable construction, because an absent slave sustains no injury from his freedom being suspended on the condition of a freeman paying his ransom. The contract of *Kitabat* is therefore valid in this instance also, and remains suspended, in its effect, upon the assent of the slave, merely with respect to the thousand *dirms* being obligatory upon him.—(Some say that this is the case stated by *Kadooree*.)—It is to be observed that, in this

A slave is free upon another person engaging for and paying his ransom; or, on acceding to the engagement he becomes a *Mokatib*.

case, the freeman, where he pays the ransom himself, is not entitled to any thing from the slave, because in so doing he acted gratuitously.

Case of a slave engaging in a *Kitabat* for himself and another slave.

If a slave agree to a contract of *Kitabat* on behalf of himself and another slave, who is the property of his master, and absent,—in this case, whether the ransom be paid by the slave present, or by the absentee, they are both emancipated.—The nature of this case is that a slave says to his master, “make me a *Mokâtib*, together with such an “absent slave, in consideration of one thousand *dirms*,” and the master makes them *Mokâtibs* accordingly,—which is valid, on a favourable construction.—Analogy would suggest that the contract is valid with respect to the present slave only, as he has a power over his own person;—but that it is suspended with respect to the absentee, as the one who is present has no power over *his* person.—The reason for a more favourable construction is, that the present slave, in first referring the contract to himself, rendered himself the principal, and the absentee a dependant;—and a contract of *Kitabat* of this nature is agreeable to law;—as where, for instance, a female slave is created a *Mokâtibâ*, in which case her children are included in her contract of *Kitabat*, inasmuch that they also become free upon her paying the ransom, without any thing being incumbent upon them.—It being therefore possible, in this way, to allow validity to the contract, the present slave is consequently empowered to agree to the contract by himself; and hence the master is entitled to take the whole ransom from him, [the present slave,] since, as he is principal, it all rests upon him: but nothing is incumbent upon the absentee, as he is merely a dependant.—Whoever, also, of the two slaves, pays the ransom, they are both free: and the master may be compelled to receive it from whoever of them makes a tender of it;—from the *present* slave, because it is from him that the debt is due; for from the *absent* slave, because, although the debt be not due from him, yet it is by the payment thereof that he obtains his freedom;—in the same manner as where a pawnor makes a tender of his debt; in which case the pawnholder

holder may be compelled to accept it, because of the pawner having occasion to redeem his pledge, although there be no debt upon his *person*. Upon either of the slaves in question paying the ransom, he has no claim whatever against the other; because if the *present* slave paid it, he in so doing paid a debt which was owing by him; or if the *absentee* paid it, he in so doing acted voluntarily, since he was under no necessity to pay it. It is to be observed that the master, in this case, cannot sue the absentee slave for any thing; because he undertook for nothing, being merely a dependant, it being the same thing whether he consented to the contract or not. As, moreover, the contract in question is binding upon the *present* slave, because of its operating upon him independant of the absentee's assent, it follows that no change is wrought in it by such assent,—in the same manner as where a person becomes bail for another without his desire, and he, upon hearing of it, gives his assent; in which case the effect of the bail is not altered, inasmuch that if the person who thus gave bail should pay any thing on that account, the creditor has no claim upon the person bailed; and so also in the present instance.

If a female slave agree to a contract of *Kitabat* on behalf of herself and of her two infant children, it is lawful;—and whoever of them pays the ransom has a claim upon the others for their proportions;—and upon any one of them paying the ransom they are all free; because the female slave constituted herself the principal, and her children the dependants, for the reasons stated in the preceding example; and she was still more competent than a *stranger* so to do.

Case of a female slave engaging in a *Kitabat* for herself and her children.

CHAP. V.

Of the *Kitâbat* of Partnership Slaves.

Case of a partnership slave, made *Mokâtib* by one of two partners, paying part of his ransom, and failing with respect to the complete discharge of it.

IF a slave be held in partnership between two men, and one of them give permission to the other to create his share in the slave *Mokâtib*, in consideration of one thousand *dirms*, and that he shall take possession of the said ransom, and this partner accordingly create his share *Mokâtib*, and receive a part of the ransom, and the slave afterwards become incapable of completely discharging it, he [the contracting partner] is in this case entitled to retain the part he has received, according to *Haneefa*. The two disciples maintain that the slave becomes a *Mokâtib*, in equal proportions, to both masters, and that, consequently, what he has paid is shared equally between them.—The ground of this difference of opinion between our doctors is, that *Kitâbat* is susceptible of division according to *Haneefa*, but not according to the two disciples; in the same manner as holds with respect to manumission; for *Kitâbat* is in one shape a cause of manumission. In the case in question, therefore, the contract of *Kitâbat* takes effect with respect only to the share of the contracting partner, (according to *Haneefa*), because of its divisibility,—the use of the other partner's assent being merely that by it his right of annulling the contract is relinquished; (for if he were not to signify his assent, he might annul the contract.) Now the consent of the other partner to the contracting partner's taking possession of the ransom, is a consent to the slave's paying it. The assenting partner, therefore, acts voluntarily * with respect to his

* Arab. *Teberrâ*; literally, "he does what he is not obliged to do," (meaning, in this place, that he, for the present, surrenders his right.)—The translator does not recollect any

his moiety in the slave's acquisitions. Accordingly, the whole taken possession of belongs to the contracting partner, and the assenting partner cannot afterwards deprive him of any part of it.

OBJECTION.—It is a rule that a person who acts voluntarily is entitled to resume what he may have voluntarily relinquished, where the end of his voluntary act has not been answered;—as if, for instance, a person were voluntarily to advance the price of merchandize, and the merchandize should afterwards perish before he had obtained possession of it, or it should prove the right of some other person; in which case the voluntary agent is entitled to take back what he had paid; and so likewise in the case in question, as the end, namely *Kitabat*, has been defeated, it would follow that the partner who voluntarily relinquished his right is entitled to resume what he had acted voluntarily with respect to.

REPLY.—In the case in question the master has undoubtedly proceeded voluntarily with respect to the *Mokatib*, who, upon failing in his engagement, again becomes an absolute slave; but a master cannot claim a debt from his slave; and hence it is that the voluntary agent cannot, in the present instance, resume what he had relinquished.

—According to the two disciples, on the contrary, an assent to the *Kitabat* of his partner's share is, in fact, an assent to the *Kitabat* of the whole slave, as they hold *Kitabat* to be indivisible. The contracting partner is therefore a principal with respect to one half, and an agent with respect to the other half: consequently the slave is a *Mokatib* to both; and as whatever, of his acquisitions, may be received by the contracting partner, is equally participated between both, it

any single English word which would convey the precise meaning, for which reason, and to avoid the obscurity of a paraphractical translation, he has, a little further on, rendered the participle from this root *voluntary agent*, a term which answers more exactly than any other to the idea of the author.

follows

Cafe of a
partnership
Mokâtibâ,
bearing a
child to her
two masters
ſucceſſively.

follows that it remains to be ſo participated after the ſlave has failed in the payment of his ranſom.

If two men conſtitute their partnership female ſlave a *Mokâtibâ*, and one of them afterwards cohabit with her, and ſhe bring forth a child, and the cohabiting partner claim it,—and the other partner afterwards cohabit with her, and ſhe bring forth another child, and this other partner claim that child, and the ſlave be afterwards unable to diſcharge her ranſom,—ſhe, in ſuch caſe, becomes an *Am-Walid* to the former partner. The reaſon of this is, that upon one of the two owners firſt claiming a child born of her, his claim was valid, becauſe of his right of property; and his ſhare became *Am-Walid* to him excluſively; for a *Mokâtibâ* is incapable of ſhifting from the property of one perſon to the property of another. Hence his ſhare alone became *Am-Walid**; (as in the caſe of a *Modabbirâ* held in partnership between two; that is to ſay, if two perſons unite in granting a *Tadbeer* to their joint female ſlave, and one of them afterwards cohabit with her, and ſhe produce a child, and the cohabiting partner claim it,—in ſuch caſe the parentage of the child is eſtabliſhed in this partner, and his ſhare alone becomes *Am-Walid*;—and ſo likewise in the caſe in queſtion;)—and again, upon the other maſter claiming the ſecond child, his claim is alſo valid, as his right of property in the ſlave exiſts with regard to the appearance, becauſe of the endurance of the contract of *Kitâbat*. But upon the ſlave proving unable to diſcharge her ranſom, the contract of *Kitâbat* becomes the ſame as if it had never exiſted; and it then becomes evident that the ſlave is wholly an *Am-Walid*, becauſe the contract of *Kitâbat*, which was the obſtruction to her ſhifting from the property of one perſon to the property of another, is annulled. Conſequently, as the cohabitation of the former partner

* That is to ſay, the property or quality of being an *Am-Walid* was reſtricted excluſively to his ſhare, and was not imparted in any reſpect to the ſhare of his co-partner. (This is the literal ſenſe of the paſſage as it occurs in the Arabic verſion.)

was prior in point of time, she from that period becomes his *Am-Walid*;—and he is responsible to the other partner for half her value, as having become proprietor of that partner's share, in virtue of the slave becoming wholly an *Am-Walid* to himself. In this case, also, an half *Akir* [fine of trespass] on account of the slave is incumbent on the *prior* cohabiting partner, because of his having cohabited with a partnership slave. The *latter* cohabiting partner, on the other hand, is responsible for an atonement to the amount of the *complete* fine; and he must also pay the other partner the value of the second child, the parentage of which is established in him; for he stands as a *Magroor*, as his right of property in the slave had an apparent existence at the time of his connexion with her; and the parentage of a *Magroor's* child is established in the *Magroor*, and it is emancipated for the value, as has been repeatedly explained. As, however, it appears that this partner, in having such connexion, has actually cohabited with the *Am-Walid* of another person, the *whole* fine is incumbent upon him, not an *half* fine. Either partner may, in this case, lawfully pay the fine to the *Mokâtibá*; because as long as the contract of *Kitâbat* continues in force, the right of taking possession of it appertains to her, as she is sole * with respect to the use of her person, or the consideration for such use. But upon her proving unable to fulfil her part of the contract of *Kitâbat*, she must account to the prior cohabiting partner for what she has thus received, as it then becomes evident that *he* is sole with respect to the use of her person. All this is according to *Haneefa*. The two disciples allege that the slave, upon claim being laid to the first child, becomes wholly an *Am-Walid* to the first partner, and that it is, consequently, utterly unlawful for the other partner to have afterwards any connexion with her; because all authorities agree that it is incumbent to make maternity † complete, as

* Meaning, "she has exclusive privilege with respect to the disposal of."

† Arab. *Amomeeat*, from *Am*, [mother.]—*Am-Walid* literally means *mother of a child*. Consequently *Amomeeat al Walid* signifies the state of being mother to a child.

far as may be practicable; and this is practicable in the present instance, by dissolving the contract of *Kitabat*, as it is capable of annulment.—The contract of *Kitabat* is therefore dissolved so far as is not injurious to the *Mokâtibâ*, such as her becoming an *Am-Walid*, and continues in force with respect to other points, such as her exclusive right to her earnings, and to the earnings of her child.—(It is otherwise with respect to a *Modabbirâ*; for the analogy conceived by *Haneefa* between a contract of *Kitabat* and the act of granting a slave *Tadbeer* is not admitted, as between those there is an essential difference, *Kitabat* being capable of dissolution, whereas *Tadbeer* is not so. It is also otherwise with respect to the sale of a *Mokâtib*, as the contract of *Kitabat* cannot be dissolved from the necessity of the sale, since this would be injurious to the *Mokâtib*;—in other words, if the sale were valid, the contract of *Kitabat* would be null, since the purchaser will not assent to the continuance of the contract of *Kitabat*; and in case the *Kitabat* were annulled, it would be injurious to the *Mokâtib*; and a *Kitabat* is not annulled with respect to any thing which would be injurious to the *Mokâtib*.)—It is also to be observed, that as the *Mokâtibâ* became wholly *Am-Walid* to the first partner, it necessarily follows that the second partner, in afterwards cohabiting with her, had connexion with the *Am-Walid* of another. Hence the parentage of the second child is not established in him, nor is it emancipated for the value. The second partner, however, is not liable to punishment, because of a demur; but he is liable to an *Akir*, or fine of trespass, since, in consequence of his commission of the carnal act, either fine or punishment is unavoidably incurred, and as the latter is remitted, the former is consequently due from him. With respect to the obligations to which the *Mokâtibâ* is subject in this instance, there is a difference of opinion. Some say that a moiety of the ransom is incumbent upon her; because the contract was annulled only so far as might not be injurious to her, and in consequence of remitting her half the ransom she sustains no injury. Some, on the other hand, maintain that the whole ransom is incumbent upon her; because the contract in question was not annulled

except merely with respect to mastership, in order that the first partner may become proprietor, and that she may in consequence become his *Am-Walid*; (that is to say, the contract is annulled purely from this necessity;) and hence the effect of annulment will not appear in regard to remitting a moiety of the ransom. It is also to be observed, that the fine on account of the *Mokâtibâ* is to be paid to her, as she is exclusively entitled to the consideration for the use of her person. If, however, she afterwards prove incapable of paying her ransom, and become again an absolute property, she must pay the said fine to the first partner, as it then becomes evident that *he* is exclusively entitled to the consideration for the use of her person. It is also to be observed, that in this case the first partner owes a compensation to the other for half the value of the slave as a *Mokâtibâ*, (judging from the opinion of *Abou Yoosaf*;) since he [the first partner] has become proprietor of her at a time when she has become a *Mokâtibâ*. He therefore is thus responsible, whether he be rich or poor, as this is a *Zimân Timallook*, or recompence for an assumption of property, because all the effects of right of property are obtained, with respect to the slave, such as the legality of generation, right of service, and so forth. According to the opinion of *Mohammed*, the first partner is responsible to the second for whatever is the smallest of the two,—the half value of the *Mokâtibâ*, or the half of what remains unpaid of the ransom; because his partner's right extends to the half of the slave's person, if she be incapable of discharging her ransom, or to the half of the ransom if she discharge it. As, therefore, his right embraces two objects, he is entitled to that one of them which is the smallest.

In the case above stated, if the second partner should not have connexion with the *Mokâtibâ*, but create his share of her *Modabbirâ*, and she be afterwards unable to pay her ransom, the *Tadbeer* he has thus granted to her is null, as it now appears that he has not constituted his own property *Modabbirâ*, but the property of the first partner.—This, according to the two disciples, is evident; because (as they

Case of a partnership *Mokâtibâ* bearing a child to one master, and created a *Modabbirâ* by the other.

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maintain)

maintain) the first partner became proprietor of her *in toto*, in consequence of making her an *Am-Walid*, before her incapacity to pay the ransom appeared. It is also evident, according to *Haneefa*, because (as he maintains) in consequence of her incapacity to pay her ransom, it appears that the first partner has become proprietor of the second partner's share from the period of cohabitation, and it thence appears that he [the second partner] created *Modabbirâ* what was not his own property; and the validity of *Tadbeer* rests upon right of property:—contrary to the *establishment of parentage*, the validity of that resting upon *affinity*, as has been explained in its proper place. It is also to be observed, that the slave in question, in case of the second partner not having connexion with her, but creating his share of her a *Modabbirâ*, is an *Am-Walid* to the first partner, as he has become proprietor of the other partner's share; and she is completely and entirely so, because of what was already said, that “all authorities agree that “it is incumbent to make maternity complete.” The first partner is responsible to the second for a moiety of the *Akir*, or fine of trespass, as having had connexion with a partnership slave; and he is also responsible for half her value, as having become proprietor of his half, in virtue of *Isfeelâd*, which requires that he become proprietor for the value. The child born of the slave, moreover, appertains to the first partner, as his claim to it is valid, the occasion of such validity (namely, right of property) existing in the slave. This is the opinion of all our doctors, on the grounds which have been before explained.

Case of a
partnership
Mokâtibâ
emancipated
by one of her
masters.

IF two masters create their partnership slave a *Mokâtibâ*, and one of them, being wealthy, afterwards emancipate her, and she, after that, prove unable to pay her ransom, in this case the emancipator is responsible for half her value, for which she then becomes responsible to him*. This is according to *Haneefa*. The two disciples maintain

* That is to say, which she is accountable for to him, and must discharge by emancipatory labour, before she can obtain complete liberty.

that she is not responsible to him for such half, because, in consequence of her incapacity to pay her ransom, she again becomes an absolute slave, and is the same, in fact, as if she had never been any thing else.—In the instance, also, of one of two partners emancipating his share of a partnership slave, there is a difference of opinion concerning the recovery of the compensation;—for, according to *Haneefa*, the non-emancipating partner has in this case three things at his option;—he may either emancipate his share, or require emancipatory labour on account of it from the slave, or take a compensation for the value of it from his partner;—whereas, according to the two disciples, he must take a compensation from his partner for the value, if he be rich, or if he be poor he must require emancipatory labour from the slave.—There is also, in this instance, a difference with respect to the *Willa*, or right of inheriting to the slave; for this, according to *Haneefa*, belongs to both partners, in proportion to their respective shares, provided the other partner also emancipate his share, or require emancipatory labour,—or, it belongs exclusively to the emancipating partner, if the non-emancipator take from him a compensation for the value of his share;—whereas, according to the two disciples, the *Willa* belongs to the emancipator, exclusively, at all events. The difference of opinion upon these three points is occasioned by the difference between our doctors concerning the divisibility of manumission, as already set forth under its proper head.—What is above advanced proceeds on the supposition of the slave being unable to pay her ransom; for before her incapacity becomes apparent, the non-emancipating partner cannot take a compensation from the emancipator, according to *Haneefa*, because as (agreeably to his tenets) manumission is divisible, the effect of his emancipation of a part is merely to render the share of the non-emancipator like a *Mokátib*; and as the slave is already a *Mokátibá*, it follows that no change is wrought in that share by such manumission. According to the two disciples, on the contrary, as manumission (agreeably to their tenets) is indivisible, the whole slave becomes free, whence the non-emancipating partner

is

is entitled to take a compensation from the emancipator for the value of his share, provided he be rich,—or, if he be poor, to require emancipatory labour from the slave;—for as this is a case of *recompence for manumission*, the wealth or poverty of the emancipator occasions a difference.

Case of one of two masters creating his share in a slave *Modabbir*, and the other then emancipating his share.

If one of two masters constitute his share in a slave *Modabbir*, and the other master, being wealthy, afterwards emancipate his share, in this case the former has it at his option either to take a compensation from the emancipator for half the value of the slave, as a *Modabbir*, or to require emancipatory labour from the slave, or, lastly, to emancipate him gratis. If, on the contrary, one partner first emancipate his share, and the other then constitute his share *Modabbir*, this partner cannot take any compensation from the emancipator,—but he may either require emancipatory labour from the slave, or may emancipate him gratis*. With respect to the *Modabbir* value of the slave, some say that it is to be established by appraisers.—Others, again, contend that it is two thirds of the value as an absolute slave; and this is approved; because the advantages derived from a slave are of three kinds or descriptions,—first, *sale*, and the like,—secondly, *service*, and the like,—and thirdly, *manumission*, and the like;—and as one of these is done away by *Tadbeer*, (namely, *sale* and the like,) it follows that one third of the value drops.—It is proper to remark, that upon the emancipator paying the *Tadbeer* partner a compensation, still he does not, in consequence, become proprietor of that portion of the slave for which he pays such compensation; for a *Modabbir* cannot shift from the property of one person to the property of another;—as where, for instance, a person usurps the *Modabbir* of another, and

* A small portion of the text, explaining the principles upon which *Haneefa* proceeds in this instance, is here omitted, as it is exceedingly trifling, and somewhat obscure, and the substance of it has already been explained in treating of the manumission of partnership slaves.

he [the *Modabbir*] absconds, and the usurper pays the owner a compensation; in which case he does not become proprietor of the *Modabbir*, but upon his being taken and brought back, is only at liberty to require emancipatory labour from him.—If one of the two masters first emancipate the slave in question, the other has three things at his option, according to *Haneefa*: and if he create his share a *Moddabbir*, his option of taking compensation discontinues, but he has still an option of emancipating the slave, or requiring emancipatory labour from him, as a *Modabbir* is capable of either being emancipated or having emancipatory labour required from him.—*Aboo Yoosaf* and *Mohammed* have said that if one of the two masters first constitute his share in the slave *Mokatib*, the emancipation by the other partner would be null; because as (according to them) *Tadbeer* is indivisible, the partner who grants it thereby becomes proprietor of the other partner's share, and must make a compensation to him for half the value, whether he be rich or poor, as this is a *Zimān Timallook*, or *recompence for assumption of property*, the obligation of which is not affected by the wealth or poverty of him who is responsible for it.—He must, moreover, make this compensation for half the value at the rate of an *absolute* slave, as the slave whom he has constituted *Modabbir* is an *absolute* slave.—If, on the contrary, one of the two partners first emancipate his share, *Tadbeer* by the other partner would be null; because (according to them) manumission is indivisible; whence the slave is emancipated *in toto*, and therefore the point upon which the validity of *Tadbeer* rests does not here exist.—And in this case the emancipator is responsible for half the value of the slave, provided he be wealthy; or, if he be poor, the slave must perform emancipatory labour for half his value,—because this is a *Zimān Itāk*, or *recompence for manumission*, the nature of which is different, according to the emancipator's circumstances.

CHAP. VI.

Of the Death or Insolvency* of the *Mokâtib*; and of the Death of his Master.

A *Mokâtib* failing in his payments, must (if he appear on enquiry to be solvent) be indulged with a short delay:

UPON a *Mokâtib* failing to make good the stated payments stipulated†, the magistrate must examine into his circumstances; and in case he find that there are recoverable debts owing to the *Mokâtib*, or that he has property in another person's hands, which is likely to be restored, he must not precipitate his decree of inability, but must wait for two or three days, out of tenderness to both parties,—to the master, in order that he may get the ransom, and to the slave, in order that he may obtain his liberty.—The time of waiting is fixed at three days, because this is the time granted for making experiment of the truth of pretexts,—as in the delay allowed to a defendant, for the purpose of accommodation,—or to a debtor, for the purpose of paying his debts:—hence the time of waiting must not exceed that term.—If, on the contrary, the *Mokâtib* have nothing whatever, and the master require the magistrate to pass a decree of inability, he must accordingly pass such decree forthwith, and dissolve the contract of *Kitâbat*.—This is according to *Haneefa* and *Mohammed*.—*Abou Yoosaf* maintains that the magistrate must not pass a decree until such time as the *Mokâtib* shall have failed in two payments successively, because of a saying of *Alee*, “Upon the MOKÂTIB falling in arrear two payments, successively, let him revert to his original state of an absolute slave,”

* Meaning, “his inability to complete the payment of his ransom.”

† The ransom or consideration for *Kitâbat* is generally stipulated to be paid by the slave in separate *Kifts*, or *lots*, at appointed times, which are here termed by the translator, the payments.

as from hence it may be inferred that he does not revert to a state of absolute bondage as long as he does not fail in two payments; since, as the prophet's successor here suspends his so doing upon that circumstance, it cannot happen until that circumstance takes place. Besides, a contract of *Kitabat* is a contract of friendship and benevolence, whence it is most laudable that a prompt performance be not insisted on in it.—The time for payment, moreover, is *after* the arrival of the period appointed;—(in other words, upon the term of credit expiring, payment becomes due; but the contract is not dissolved until after the lapse of such a time as may afford an opportunity to provide money for the payment;—) and it is therefore indispensably requisite that, after the expiration of the term of credit, a delay be granted of such a time as may serve for experiment, and enable the slave to make payment;—and the most approved time of such delay is the time agreed upon by the contracting parties, namely, the term of the second payment. As soon, therefore, as the term of credit of the second payment is expired, if the slave have not paid, his inability to pay becomes established, because of the lapse of the term of delay agreed upon by the contracting parties.—The argument of *Haneefa* and *Mohammed* is that the cause of annulment, namely, inability to pay, is already fully established, since a person who is incapable of making good *one* payment is certainly incapable of making good *two*.—Besides, the design of the master is to obtain possession of the property at the expiration of the term of credit; and as this design is not answered, it follows that the contract of *Kitabat* is dissolved, unless he assent to a farther delay. This reasoning, however, does not hold with respect to a forbearance for two or three days, as that is indispensably requisite to enable the *Mokatib* to make good his payment: this, therefore, is not accounted a delay. With respect to the dependance placed by *Abou Yoosaf* upon the saying of *Alee*, it may be replied that traditions differ upon the point in question; for it is related that *Omar*, upon his *Mokatiba* proving unable to make good one payment of her ransom, remanded her to her original state of absolute bondage;—and

where cases in point thus essentially differ, no positive inference can be drawn from them.

but the *Kitàbat* may be dissolved by his consent without such delay;

IF there be a failure of payment submitted to the decision of some other than the *Kázee*, or other public magistrate, and the *Mokâtib* slave prove unable to make good his engagement, and his master accordingly reduce him again to the state of an absolute slave, with his [the slave's] consent, it is lawful, because as the contract of *Kitàbat* might be dissolved by his consent, without any pretext, it may consequently be so dissolved where a pretext actually exists *a fortiori*.—If, however, the slave be not assenting, a decree of the *Kázee* is indispensably requisite to annul the contract of *Kitàbat*; because as it is complete and binding, a decree of the *Kázee*, or the assent of the parties, is therefore requisite to its dissolution;—in the same manner as holds with respect to a restitution of merchandize, after seizure, in consequence of a defect.

and upon the *Kitàbat* being dissolved, the bondage completely reverts.

UPON a *Mokâtib* becoming incapable of paying his ransom, all the effects of bondage revert, in consequence of the dissolution of the contract of *Kitàbat*.—In this case, also, all the earnings of the *Mokâtib*, then in his possession, belong to his master, as they then appear to be the acquisitions of his slave. The ground of this is, that the right of property in those acquisitions was suspended; for if the *Mokâtib* had duly paid his ransom they would have belonged to him, whereas failing this, they belong to his master;—and upon the inability becoming evident, the suspense discontinues, and the earnings belong to the master accordingly.

Decree to be issued on the death of an insolvent *Mokâtib*.

IF a *Mokâtib* die, leaving effects sufficient to discharge his ransom, the contract of *Kitàbat* is not dissolved; but a decree is passed, directing that “every thing owing by the *Mokâtib* shall be paid out of his estate,—(that) he is free upon the last instant of his life,—and “(that, consequently) what remains, after paying the ransom, shall

“ go

“go to his heirs, and his children are free.”—This is the doctrine of *Alee* and *Ibn Mas'ood*; and our doctors have always acted in conformity with it.—*Shafe'i* maintains that the contract of *Kitabat* becomes null, and the *Mokâtib* dies an absolute slave. The effects, also, left by him belong to his master; because *Zeyd Binsabit* has said, “a contract of *Kitabat* is annulled by the decease of the *Mokâtib*,” and also, because the design of a contract of *Kitabat* is the emancipation of the *Mokâtib*, and as the accomplishment of this end has become impracticable, the contract is consequently null. The ground of this is that, even admitting freedom to be established, still it is not exempt from one of three constructions; for it is either established *after* death, as happening in consequence of that event,—or *before* death,—or, lastly, *after* death, in the manner of a succession. Now on all these suppositions it is a mere nullity:—in the first, because, in consequence of having died, he no longer remains capable of being emancipated;—and, in the second, because the condition of his freedom (namely, the payment of a ransom) has not taken place;—and, in the third, because a thing is first established and then succeeded to,—but here the establishment of the *Mokâtib*'s freedom *a priori* is impossible. The argument of our doctors is, that a contract of *Kitabat* is a contract of exchange; and as it therefore would not be rendered null by the decease of *one* of the contracting parties, namely the master, since the continuance of such a contract is both convenient and requisite, for the sake of giving life to the master's right,—it follows, in the same manner, that it is not annulled by the decease of the other contracting party, namely the *Mokâtib*, since the continuance of the contract is requisite for giving life to his right *a fortiori*, his right being of a still more forcible nature than the right of his master, inasmuch that the contract is binding on the part of the master, as he cannot of himself annul it on account of the right of the slave,—whereas it is not binding on the part of the slave, as he has it in his power to annul it of himself.—It is to be observed, that some of the learned hold the slave to become free after death, in this way, that he is still supposed virtually

to live in his contract. Most lawyers, however, maintain that he is free upon the last instant of his life, in the manner of a succession, and in this way, that the cause of his freedom, namely the discharge of his ransom, is referred to a time antecedent to his death; and that therefore the payment of the ransom by the heir of the *Mokâtib* (namely his successor) is equivalent to payment by himself;—and all this is possible; as is explained at large in the *Khilâfeeyât* *.

A *Mokâtib* dying insolvent, and leaving a child born in *Kitâbat*, the child must perform labour to the value of his ransom.

IF a *Mokâtib* die without leaving property sufficient to discharge his ransom, but leave a child, who was born during the existence of the contract, this child is to perform emancipatory labour for the discharge of its father's ransom, to a degree equivalent to the payments stipulated by the father,—and upon the child so doing, a decree must be passed, declaring the father to have been free before death; and the child himself becomes free, as having been included in the father's contract of *Kitâbat*;—for as, in this instance, the earnings of the child are the same as the earnings of the *Mokâtib*, it follows that payment made by the child is equivalent to payment by the father; and the case is consequently the same as if the *Mokâtib* had left behind him property sufficient for the discharge of his ransom.

If the *Mokâtib* had purchased his child, the child must discharge the ransom, or become a slave.

IF a *Mokâtib* die, without leaving property sufficient to discharge his ransom, but leave his child, whom he had purchased † during the existence of the contract, this child is to be informed that “he must either now pay the father's ransom, or himself become an absolute slave.”—This is according to *Haneefa*.—According to the two disciples, the child is to discharge the ransom agreeably to the payments

* An Arabic law-treatise so termed.

† This supposes his child to have been a slave to some other person, (not the master of the *Mokâtib*,) and that the *Mokâtib* has purchased him from that person with a view to his future freedom, which must take place upon the *Mokâtib* himself becoming free.

and times of payment stipulated by the father; because such is the rule with respect to a child *born* during the existence of the contract, on account of that child being a *Mokâtib* in dependance from the father, and the same reason holds with respect to a child *purchased* during the existence of the contract,—whence it is that the master is at liberty to *emancipate* such child (in opposition to any *other* acquisitions of the *Mokâtib*, as over these the master has no power:)—the *purchased* child, therefore, is subject to the same rule, in this particular, with the child born during the existence of the contract. The argument of *Haneefa* upon this point is that there is a material difference between the cases;—because, as the different payments and times of payment are established by the stipulations in the contract, they are established with respect only to any person included in it; but the *purchased* child is not included in the contract, as to him it has no reference:—the terms of the contract, therefore, do not extend to or reach him, because of his being distinct. It is otherwise with respect to a child *born* during the contract, as he was conjunct at the time of the existence of *Kitâbat*, and consequently the terms of the contract extend to him;—and as he is thus included in the terms of it, he therefore must perform emancipatory labour agreeably to the payment stipulated in it.

If a *Mokâtib* purchase his child, and then die, leaving property sufficient to discharge his ransom, the child is his heir;—because, upon a decree being issued, declaring the *Mokâtib* to be free on the last instant of his existence, a decree must also issue, declaring the child likewise to be free at that time, as being a dependant of the father with respect to *Kitâbat*.—The child therefore is free, and the heir of a freeman.—In the same manner also, the child is free in a case where father and child have both become *Mokâtibs* under one contract, and the father dies, leaving property sufficient to discharge the ransom;—because the child, if an infant, is a dependant of the father,—or if an adult, they are both regarded as one person, because
of

If he die solvent, the child is free and his heir.

of the unity of the contract. Upon a decree, therefore, being issued, declaring the freedom of the father, a decree is also issued, declaring the freedom of the child at the same time.

Case of a murder committed by the child of a deceased *Mokâtib* begot upon a freed-woman.

If a *Mokâtib* die, leaving a child, born to him of a freed-woman, together with debts owing to him by different persons sufficient to discharge his ransom, and the child afterwards commit a murder, and a fine of blood be decreed against the *Akilâs* of the mother, this does not amount to a decree of insolvency against the *Mokâtib*; because in consequence of such decree the effect of the *Kitâbat* is rather confirmed and established; (for the contract requires that the child of the *Mokâtib* be annexed to the *Marwas*, or patrons of the mother, and that the fine be levied upon them, since they are her tribe*,—in this way, however, that there was a possibility that the father might have become free, and might consequently have drawn over the *Willa* right with respect to the child to his own patrons;—) and the *Kâzee* decreeing any thing which tends to establish and confirm the effect of the *Kitâbat*, does not amount to a decree of insolvency against the *Mokâtib*. If, on the contrary, the *Marwas* of the mother litigate the right of *Willa* in regard to the child with the *Marwas* of the father, and the *Kâzee* decree in favour of the mother's *Marwas*, this is an adjudication of the *Mokâtib*'s insolvency; because in this instance the difference between the *Marwas* is not merely incidental, but is brought forward on its own grounds, and rests upon the endurance or dissolution of the contract of *Kitâbat*; for if the contract be dissolved, the *Mokâtib* dies a slave, and the *Willa* of the child goes of course to the *Marwas* of the mother; and if, on the other hand, the contract continue in force, and the payment of the ransom be connected with it, the *Mokâtib* dies a freedman, and the *Willa* of the child shifts to the *Marwas* of the father.—Now, concerning the *Mokâtib*'s being free or otherwise,

* "They are her *Akilâs*."—(See *Moâkil*.) This case cannot be fully comprehended without a reference to the laws of *Deyit*, *Moâkil*, and *Willa*.

there is a difference of opinion among the companions.—Hence whatever the *Kázee* may decree takes effect; and accordingly, in this last instance, his decree is a decree of insolvency.

IF a person bestow any thing upon a *Mokátib* by way of alms*, and he give the same to his wealthy master as part of his ransom, and be afterwards incapable of completely discharging the ransom, that thing is perfectly lawful to the master; because the right of property in it has undergone an alteration, as the slave had become proprietor of it as an alms, and the master has become so as a consideration for manumission;—which is manifested by the words of the prophet, speaking of *Bareerá*, “*This is an ALMS to him, but to me it is a GIFT-OFFERING.*”—It is different where a *Mokátib* gives his rich master, or a *Háshimee*, liberty to use or dispose of *viñtuals*† which have come to him as an alms; for they cannot lawfully eat those viñtuals, because as they are the property of the person who gave a liberty with respect to them, it follows that these persons, in eating them, would eat the property of another, as the right of property in the viñtuals has not undergone any alteration.—Correspondent to this is a case where a person purchases an article by an invalid purchase, and then gives another a liberty with respect to it,—for still the article is not lawful to this other,—whereas if he were to make a formal *conveyance* of the article to him, it would be lawful.—What is here advanced proceeds on a supposition of the *Mokátib* proving unable to pay his ransom, after having given his master the article in question as a part of it.—If, on

An alms received by a *Mokátib*, and made over to his master, is lawful to the latter in case of the *Mokátib*'s insolvency.

* It is common to bestow alms upon slaves, with a view to enable them to purchase their freedom; and a portion of the *Zakát*, or public alms levied by government, is allotted to them for this purpose. (See Vol. I. p. 53.)

† Literally, “renders free [*Mobah*] to his rich master, or a *Háshimee*, viñtuals, &c.” The point upon which the reasoning here turns is the distinction between merely giving a person permission to do as he likes with an article, and making it over to him by a formal conveyance and investiture.

the

the contrary, he be insolvent *before* he have so given it, in this case also the same rule obtains, (according to the *Rawāyet Sabeeh*;)—in other words, the article is lawful to the master.—This, according to *Mohammed*, is evident, because (agreeably to his tenets) by the insolvency of the *Mokâtib* an alteration is wrought in the right of property, since upon this appearing, the master becomes proprietor of his acquisitions, by a new right:—and it is also evident, according to *Abou Yoosaf*, notwithstanding the master's right of property be established by the *Mokâtib*'s insolvency;—the reason, however, according to him, is that the baseness does not exist in the *alms*, but in the act of the *taker*, who incurs a degradation, which it is not lawful for a wealthy person to subject himself to without necessity,—nor for a *Hâshimee*, because of his superior rank:—now the master is not found in the act of *taking*, and he therefore resembles a pilgrim or traveller who arrives at his own country, or a pauper who becomes wealthy,—and in whose hands there still remains a part of the alms they had received; for such remaining part is lawful to them; and, on the same principle, if a *Mokâtib* become free, and acquire wealth, still any thing remaining to him of the alms he may have received is lawful to him.

Case of an offence committed by a slave, who is afterwards made *Mokâtib* by his master.

If a slave commit an offence, and his master, not being informed of this, create him a *Mokâtib*, and he [the *Mokâtib*] prove insolvent, the master must in this case either part with him, in recompence for the offence, or pay an atonement for it; such being the original rule in offences committed by slaves. The master, moreover, was not aware of his offence during the existence of *Kitâbat*, so as to embrace the option of paying the atonement; and at any rate, the *Kitâbat* would at that season have deprived him of the alternative, as it would have prevented him from parting with the offender: but upon the *Kitâbat* failing the original rule reverts. In the same manner also, if a *Mokâtib* commit an offence, and the *Kâzee* neglect to decree a fine for the offence until such time as he [the *Mokâtib*] proves insolvent, the master must in that case either part with him, or pay an atonement;

ment; for upon the *Kitàbat*, which was the obstacle to parting with him, failing, the original rule reverts, as above mentioned.—If, on the other hand, the *Kázee* had decreed a fine for the offence whilst the slave was a *Mokátib*, and he [the slave] afterwards prove insolvent, it [the fine] is in that case a debt upon him, for the discharge of which he must be sold; because the right of the avenger of the offence in question to the slave's person shifts to his value, in consequence of the *Kázee*'s decree. This is the doctrine of *Haneefa* and *Mohammed*; and *Abou Yoosaf* also laterally adopted it. He [*Abou Yoosaf*] had before held it a maxim that the slave should be sold on account of the fine, notwithstanding he were to prove insolvent antecedent to the *Kázee*'s decree; (and such is the opinion of *Ziffer*;) because, as the obstacle to the master parting with him (namely, *Kitàbat*) is established and extant at the time of offence, it follows that upon the occurrence of the offence at that time, the value of the slave becomes due;—in the same manner as holds with respect to a *Modabbir* or *Am-Walid*; that is to say, if a *Modabbir* or *Am-Walid* commit an offence, their value is due, so likewise in the present instance. The argument of *Haneefa* and *Mohammed* is, that the obstacle is capable of failure, since it is possible that the *Mokátib* may prove insolvent, and consequently become again an absolute slave. As, moreover, the right of the avenger of offence does not shift to his value on the instant, it therefore remains suspended upon a decree of the *Kázee*;—in the same manner as where a purchased slave absconds before the purchaser has taken possession of him; in which case the dissolution of the sale depends upon a decree of the *Kázee*, as it is still possible that the slave may return.—It is otherwise with respect to a *Modabbir* or *Am-Walid*, as *Isteelád* is incapable of failure or dissolution, under any circumstance whatever.

If the master of a *Mokátib* die, the contract of *Kitàbat* is not dissolved, in order that the right of the *Mokátib* may not be annulled; for *Kitàbat* operates as a cause of freedom, and freedom is the right

A contract of *Kitàbat* is not dissolved by the death of the master.

of the *Mokâtib*;—and as, whatever is the right of a person, the cause thereof is also his right, it follows that the *Kitâbat* is the right of the *Mokâtib*.—Now a right is not annulled by death, in the same manner as a debt owing from any person is not annulled by the death of that person.—The contract of *Kitâbat*, therefore, is not dissolved: but the *Mokâtib* must be told to account for his ransom to the heirs of the deceased, agreeably to the payments engaged for in the contract; because, as that is the mode in which he is entitled to freedom, and as the cause of his freedom has also been thus prescribed, it consequently continues so without any alteration.—It is to be observed, however, that the master's heirs are his substitutes with respect only to receiving or exacting payment of the ransom.—If, therefore, one of them emancipate his share in the *Mokâtib* gratis, still his manumission does not take effect, as he has not become a *proprietor* of that share, a *Mokâtib* not being a subject of inheritance.—The ground of this is that as a *Mokâtib* cannot become a property in virtue of any *other* causes of right of property, (such as *sale*, *gift*, and so forth,) so neither can he in virtue of inheritance. If, however, all the heirs unite in emancipating the *Mokâtib*, he is free; because his ransom is in this case remitted; for the manumission exempts him from it, as it is the right of the heirs, and ransom is a subject of inheritance;—and upon the ransom being remitted, he becomes free of course,—in the same manner as where a master exempts his *Mokâtib* from ransom.—Where, on the contrary, emancipation is granted by only *one* of the heirs, an exemption from his share [of ransom] is not established; because the manumission above described is rendered an exemption, in the manner of an essential requisite, or thing taken for granted, in order that the freedom of the *Mokâtib* may be valid and effectual. Now manumission is not established by a partial exemption, or a partial payment, with respect either to the *whole* or to a *part* of the *Mokâtib*; and consequently the exemption cannot be

be established; because where *that which requires* (namely, manumission) does not appear, *that which is required* (namely, exemption) cannot be established;—and if, on the other hand, the *Mokatib* were exempted from the *whole* of the ransom, in consequence of emancipation by a part of the heirs, it would be absurd, because the right of the other heirs is connected with it.

H E D A Y A.

B. O O K XXXIII.

Of WILLA*.

Definition of
the term.

WILLA literally means assistance and friendship. In the language of the LAW it signifies (according to the exposition in the *Indyat*) that mutual assistance which is a cause of inheritance.

Willā is of
two descrip-
tions, *Ittakit*

WILLA is of two species or descriptions. I. *Willā Ittakit*†, (which is also termed *Willā Niāmit*‡,) the occasion of which is manu-

* There is no single word in our language fully expressive of this term. The shortest definition of it is "the relation between the master (or patron) and his freedman;" but even this does not express the whole meaning.

† The *Willā* of manumission.

‡ The *Willā* of beneficence, or of favour.

mission,

mission from right of property, (according to the *Rawdyet-Sabeeb*,) and *Mawwalât*, whence it is that if a person become proprietor of his kinsman by inheritance, such kinsman is free, and his *Willa* goes to that person.—

II. *Willa Mawwalât* *, the occasion of which is a contract of *Mawwalât*, [mutual amity—or patronage and clientage,] as shall be explained in its proper place.—The occasion of the first species, therefore, being manumission, and of the second, a contract of mutual amity, they are termed the *WILLA* of *manumission*, or the *WILLA* of *mutual amity*, by a reference of the effect to the cause. Both species, moreover, bear the characteristic of *assistance*:—and as the *Arabs* were accustomed to assist each other in various ways, and the prophet interpreted such mutual assistance into *Willa* of both species, he used to say of them, indiscriminately, “*They have WILLA people among them*,” and also, “*They have HALEEFS* [sworn confederates] *among them*,” by which last is understood the relation of *Mawla Mawwalât*, as the *Arabs* were accustomed to confirm their contracts of *Mawwalât*, or mutual amity, by oaths.

If a master emancipate his slave, the *Willa* of such slave appertains to him;—because the prophet has said, “*The WILLA of a slave belongs to the person who emancipates him*,” and also, because † [two consequences arise from manumission; I. Liability to the *Deyit*, or fine of blood,—the cause of which liability is *assistance*, exhibited and ob-

The *Willa* of a slave appertains to his emancipator, rendering him liable to fines incurred by the slave.

* The *Willa* of mutual amity, or of confederacy.

† The passage between the crochets is in some places rather obscure; and affords an instance of the great liberty occasionally taken by the *Molouees* employed in the composition of the *Persian Hedaya*, for which indeed they have endeavoured to apologize, by alledging the excessive closeness and obscurity of the original text. [See *introductory address*.] The whole passage, in the *Arabic*, stands *verbatim* thus,—“because he assists him thereby, and consequently attaches him; and he likewise, in effect, gives life to him by the destruction of his bondage, whence he inherits of him; and his *Willa*, with respect to him, resembles relationship; and also, because [there must be] an acquisition for a surrender.” What is mentioned of “the liability to the *fine of blood* being induced by manumission” is because an emancipator is the *Akilâ* of his freedman. (See *Moâkil*.)

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and endowing
him with a
right of in-
heritance.

tained by means of manumission; and, II. Inheritance,—because the emancipator has given life to the emancipated by means of removing his bondage, and consequently inherits of him. The relationship of *Willa*, moreover, resembles relationship of blood, with respect to inheritance, and the obligation of atonement by fine, the prophet having said, “*The relationship of WILLA is like the relationship of consanguinity.*”

OBJECTION.—From this it would follow that the emancipated also inherits of his emancipator, where he is destitute of kindred; (and such is the opinion of *Hāsan Bin Zeeyād*;) whereas it is otherwise.

REPLY.—An emancipated slave is a stranger with regard to his emancipator, and consequently does not inherit of him. The emancipator's right, moreover, to inherit of the emancipated, is founded on a particular text of the KORAN, in opposition to analogy, which, therefore, must not be abandoned or departed from with respect to any other instance of inheritance.

—Another reason, also, why the *Willa* of an emancipated slave appertains to his emancipator is, that there must be an acquisition for a surrender,—or, in other words, an advantage in lieu of a loss; and as, in consequence of emancipation, the property involved in the slave is destroyed, the *Willa* thereof consequently belongs to his emancipator.] It is to be observed that a woman is entitled to the *Willa* of her emancipated slave in the same manner as a man;—because of the tradition before quoted;—and also because it is recorded that upon a freedman of *Hamazá* dying, and leaving a daughter, (*Hamazá* also being dead and having left a daughter,) the prophet divided his effects equally between this daughter and the daughter of *Hāmazá*.—It is also proper to observe that manumission *for* a compensation, and manumission *without* a compensation, are alike with respect to this rule, as the tradition abovementioned is absolute.

If a person emancipate his slave, engaging, at the same time, that "he will not claim the right from him," such engagement is null, and the *Willa* appertains to the emancipator notwithstanding; because the condition here mentioned is contrary to the text [of the KORAN,] and is consequently invalid.

A stipulation of waving the claim to inheritance is invalid.

UPON a *Mokâtib* paying his ransom he is free, and the *Willa* belongs to his master, although he become free after his [the master's] decease*; because he becomes free in consequence of a contract of *Kitâbat* to which his master was a party; and as a *Mokâtib*, like a *Modabbir*, is not a subject of inheritance, he is consequently emancipated while the master's right of property continues.—The same rule also holds with respect to a slave whose master has bequeathed him manumission,—or a slave whom a person directs, in his will, to be purchased and set free upon his decease,—for the act of the executor, after the testator's death, is equivalent to the act of the testator.

The *Willa* of a slave emancipated by *Kitâbat* appertains to his master;

OBJECTION.—The slave in question cannot be considered as emancipated from the testator, except where he is his actual property; and he discontinues from being his property because of his death.

REPLY.—The whole estate of the testator is regarded as his property as long as there is occasion,—that is, until his will be executed.

If a master of slaves die, his *Modabbirs* and *Am-Walids* are free, (as has been explained in treating of manumission,) and the *Willa* of them belongs to him†, as he emancipated them by making them *Modabbirs* and *Am-Walids*.

and the same of the *Willa* of *Modabbirs*, *Am-Walids*,

* In which case the *Willa* appertains to his heirs.
to his heirs.

† Descending, as a heritage,

and slaves
emancipated
by affinity.

If a person become proprietor of a relation within the prohibited degrees, such relation is free, (as has been explained under the head of *manumission*,) and the *Willa* of him belongs to his person, as he is emancipated from his property.

In the eman-
cipation of a
pregnant fe-
male slave,
the *Willa* of
the foetus be-
longs to her
emancipator:

If a slave marry the female slave of any person, and she become pregnant, and her master then emancipate her, she is accordingly free, together with the foetus in her womb;—and the *Willa* of the foetus belongs to her master, and never can shift from him; because he has emancipated it, not as a dependant of the mother, but independantly, and of itself, as being a portion of the mother, and it is capable of being so emancipated.—The *Willa* of the child, therefore, cannot shift from him, because the prophet has said, “*The WILLA belongs to the per- son who emancipates.*”—The same rule holds if the female slave be delivered of a child at any time short of six months from the date of her manumission, because in this case the existence of the foetus at the time of manumission is certified. The same rule also holds if she be delivered of *two* children, one within the six months, and the other after they have expired; because those are twins, as having been be- gotten from one seed. It is otherwise where a female slave, being pregnant, enters into a contract of *Mawalât* with any person, and her husband also enters into a similar contract with any other person; for in this case the *Willa* of the child belongs to the master of the *father*, because an embryo cannot of itself be a party to a *Mawalât* contract, as that is concluded by proposal and acceptance, of which an embryo is incapable.

but if she be
not delivered
within six
months from
the date of
her manumif-
sion, it may
shift from him
to the *father's*
emancipator.

If the female slave mentioned above be delivered of a child *after* six months from the date of manumission, the *Willa* belongs to the *mother's* master, because the child is in this case free *as a dependant of the mother*, and is therefore a dependant of her with respect to the *Willa*. As, however, in this case, it is not certain that the child ex- isted at the time of manumission, so as that it should be emancipated independantly

independantly and of itself, if the father be afterwards emancipated the *Willa* shifts from the master of the mother to the master of the father, because of the child having become free, not of itself, but dependantly. It is otherwise where she produces a child *within* six months, for in that case the *Willa* would not shift from the one master to the other. The ground of this is, that *Willa* stands in the same predicament with parentage; for the prophet has said, “*WILLA is a relationship as much as the relationship of parentage, and cannot be sold, or given away, or inherited.*” In the same manner, moreover, as parentage is established on the part of the father, so also is *Willa*. Besides, the *Willa* was referred to the mother’s master, of necessity, merely because of the father’s incapacity: but upon the father becoming capable, the *Willa* reverts to his master;—in the same manner as the child of an asseverating woman* is of necessity referred to her family; but if her husband afterwards retract his assertions, the parentage of it is then established in him.—It is otherwise where a female slave is emancipated during her *edit* from the death of her husband, who was a *Mokâtib*, and who has left effects sufficient to discharge his ransom,—and she brings forth a child at any time within two years from the time of his decease; because in this case the *Willa* of the child appertains to the master of the mother; for as it is here impossible to refer the conception to a period subsequent to the father’s decease, it must therefore be referred to some time during his life;—and as the foetus existed† at the time of her manumission, the *Willa* of it therefore belongs to the mother’s master, since he has emancipated the child by itself and independantly. It is also otherwise where a female slave is emancipated whilst in her *Edit* from divorce, and brings forth a child within less than two years from the date of her manumission; for in this case also, notwithstanding her husband be emancipated, the *Willa* of the child belongs to the mother’s master, whether

* Meaning a woman repudiated in consequence of *Laqn*.

† Meaning “the child existed as (or, in the state of) a foetus.”

the divorce she was under be reversible or irreversible. It belongs to him in the case of irreversible divorce; because after such divorce the begetting of the child cannot be attributed to the father, as his having connexion with the female slave in question after an irreversible divorce would be unlawful, and we must always, as far as possible, put a fair construction on the acts of a *Musfulman*. The begetting of it is therefore referred to him *antecedent* to divorce; and as the foetus exists at the time of emancipation, the *Willa* of it consequently belongs to the mother's master, as he has emancipated it of itself and independantly. In the same manner also, it belongs to him in the case of *reversible* divorce; because the child being born of the slave in question within less than two years, it is possible that the foetus may have existed during divorce, in which case there is no occasion for a reversal of the divorce in order to the establishment of the parentage;—or, on the other hand, it is possible that the foetus may not have existed during divorce, in which case a reversal of the divorce is essential to the establishment of the parentage:—now such reversal is doubtful;—no regard, therefore, is paid to that, but the conception is referred to the time of the marriage; and as the foetus exists at the time of manumission, the child is therefore emancipated independantly and of itself. It is written in the *Jama Sagheer*, that if a slave marry a freed-woman, and they have children, and those children commit any offences, the fine falls upon the *Mawlas* of the mother; because they have become free as dependants of their mother. Their father, moreover, is not possessed either of *Akilas* or of *Mawlas* by manumission. Consequently, they are of necessity attached to the *Mawlas* of the mother, in the same manner as in the case of an asseverating woman, before alluded to: but if, afterwards, the father be emancipated, the *Willa* of them shifts to the *Mawlas* of the father, as was before explained. The *Mawlas* of the mother, however, are not in this case entitled to recover, from the *Mawlas* of the father, the fine they have paid on account of the children's offence, because at the time they paid it the *Willa* of the children appertained to them; and the *Willa* is not established

blished to the master of the father until he [the master] emancipate him [the father]; because the occasion of *Willa*, namely manumission, cannot be referred to an antecedent time, but is restricted to the time of emancipation.—It is otherwise with respect to the child of an asseverating woman, where the mother's tribe pay the fine on account of any offence committed by such child, and the husband afterwards retracts his imputation against her;—for in this case the parentage is established by referring it to the conception of that child; and as the mother's *Mawlas* have not paid the fine willingly, but *per force*, they are accordingly entitled to recover it.

If a *Persian** marry a freed-woman, and they have children, the *Willa* of those children rests with the *Mawlas* of the mother, whether she was emancipated by an *Arab* or a *Persian*. The compiler of the *Hedaya* remarks that this is the opinion of *Mohammed*; but that *Abou Yoosaf* maintains that the child is in this case subject to the same rule with the father, inasmuch as its parentage is established in the father, in the same manner as if the person who married the slave in question were an *Arab*.—It is otherwise, however, where the person who marries her is a *slave*; for as a slave is, constructively, a mere *dead matter*, the case is therefore the same as if those children had no father whatever. The argument of *Haneefa* and *Mohammed* is that the *Willa* of manumission is strong, and worthy of regard with respect to its effects, whence equality is attended to in it, inasmuch that a *Persian* emancipator is not equal to an *Arab* emancipator. The *parentage* of a *Persian*, moreover, is weak, as they pay no regard to genealogy; (whence no attention is paid by them to equality in point of family;) and that which is *weak* cannot oppose that which is *strong*. It is otherwise where the father is an *Arab*, because the parentage of an

Case of a
Persian marry-
ing a freed-
woman.

* *Arab. Affaire*. This term applies not only to the natives of *Persia*, but of all other countries except *Arabia*. The case here considered turns upon the superiority which the *Arabs* claim, in point of privileges, over all others.

Arab is strong, and is regarded with respect to equality and the payment of fines;—for as the assistance they afford to each other is on account of affinity or genealogy, there is therefore no necessity, in the case of an *Arab*, to have regard to the *Willa*.—It is related, in the *Jama Sagbeer*, that if a *Nabathean* infidel marry a freed-woman who is a Christian, and become a *Mussulman*, and enter into a contract of *Mawalát* with any person, and they afterwards have children, the *Willa* of those children (according to *Haneefa* and *Mohammed*) appertains to the *Mawlas* of the mother. *Abou Yoosaf*, on the contrary, maintains that their *Willa* appertains to the *Mawlas* of the father, (namely, his *Mawla Mawalát*;) because, although the contract of *Mawalát* be but weak, still it is on the part of the father;—and hence the children in question resemble the child of a *Persian* man and an *Arab* woman;—in other words, as, if a *Persian* marry an *Arab* woman, and she bring forth a child, it is referred to the father's tribe, so also in the present case.—(The ground on which this proceeds is that the parentage of a child is weaker on the part of the mother than on the part of the father.)—The argument of *Haneefa* is that the *Willa* of *Mawalát* is weak, (whence it is capable of dissolution,) whereas the *Willa* of manumission is strong (whence it is incapable of dissolution;) and the weak cannot oppose the strong.

If the father and mother are both freed-persons, the *Willa* of their children belongs to the father's tribe.

If the father be a freed-man, and the mother a freed-woman, the parentage of their children is referred to the father's tribe; because in this instance the parents are both upon an equality; and the father's side has the preference, as protection is on his side more effectual.

Heirship is established by

By the *Willa* of manumission *Afoobát** is established;—in other

* *Afoobát*, in its literal sense, signifies *binding together the branches of a tree, a bundle of arrows, or so forth.*—In its secondary sense it is used to express the *descent of inheritance in the male line.*

words,

words, where a person emancipates his slave he is *Affaba** to such slave, and is entitled to inherit of him in preference to his maternal uncles or aunts, or other uterine kindred; because the prophet said to a person who had purchased a slave and afterwards emancipated him, “*He whom you have thus emancipated is your brother; and if he manifest his gratitude, it is the better for him, but the worse for you;—or, if he do not manifest his gratitude, it is the worse for him, but the better for you; and if he die without leaving heirs, you are his* ASSABA.”—The daughter of *Hamaza*, moreover, emancipated her slave; and the slave died, leaving a daughter; and the prophet constituted the daughter of *Hamaza* her heir in the manner of an *Affaba*, that is, notwithstanding there was a daughter.—Where, therefore, *Afoobat* is established on the part of the emancipator, he precedes the relations; (and such is the opinion of *Alee*.) If, however, the emancipated have any *Affabas* by blood, they precede, as the emancipator comes after the paternal kindred.—The ground of this is that, in the saying of the prophet above quoted, “*if he die without leaving heirs*,” by the term *heirs* is to be understood those of the description of *Affaba*, as may be inferred from the tradition concerning the daughter of *Hamaza*. The emancipator, therefore, follows after the *Affabas*, but not after the maternal kindred†. If, on the contrary, the emancipated have no *Affabas* by blood, the whole inheritance belongs to the emancipator. This is where there is no participating heir. But where there is a sharer, the emancipator is entitled to what remains after paying the sharer his [or her] portion; because the emancipator

the *Willa* of
manumission.

* *Affaba*, in its primary sense, signifies a nerve, sinew, or tendon, of an ox or other animal, with which bundles of arrows, &c. are tied together. Hence *Affaba* is used to express the first heir or head of a family, since the various branches of the family are represented and (as it were) *bound up* in his person.—*Afoobat* might be rendered *heirship*, and *Affaba* the *heir*; but as the translator is apprehensive this might confound those terms with *Wirâsit* and *Wâris*, [inheritance and heir in the most extensive sense,] he has therefore thought it advisable, in this place, to preserve the original terms, for the sake of distinction.

† That is, he *precedes* the maternal kindred.

is the *Affaba*, agreeably to the tradition before quoted. The ground of this is, that the *Affaba* is one who protects and assists his family;—and as a master aids and assists his freed-man, (according to what has been already stated,) he is therefore his *Affaba*. Now an *Affaba* takes what remains after paying the portions:—hence the person in question takes what thus remains.—If, therefore, the emancipator were first to die, and then his freed-man, the estate of the latter would go to the sons of the emancipator, not to his daughters.

An emancipatress is entitled to the *Willa* of her freed-men, &c. but not of their children.

A WOMAN is entitled only to the *Willa* of the person whom she has herself emancipated, or of the person whom she (again) has emancipated, or of the person whom she has created a *Mokâtib*, or whom her *Mokâtib* has created a *Mokâtib*, or of the person whose *Willa* has been transferred* to her by her freed-man; because such is the recorded opinion of the prophet upon this subject; and also because, as power, and the right of possessing property, are established in the person emancipated by the act of the emancipatress, this person is accordingly referred (in regard to the *Willa*) to her; and in the same manner is referred to her the person who is referred to her freed-man. It is otherwise with respect to parentage†; (that is, the *Willa* of manumission may be established on the part of a woman, but parentage cannot be so established;) because *Willa* is established in consequence of the occurrence of a power to possess property, occasioned by and arising from the emancipation, which may proceed from a woman in the same manner as from a man;—whereas parentage is established by

* Arab. *Jurrâ*, literally “drawn over.”—A case of transferring or drawing over the *Willa*, is where (for example) the male slave of a woman marries a female slave, and the master of the female slave afterwards emancipates her, and she brings forth a child in six months from the date of her manumission; when the *Willa* of such child belongs to the mother’s master; but if, afterwards, the woman emancipate her slave, the *Willa* of the child then shifts to her, as being the emancipatress of the father.

† This means that an emancipatress is entitled to the *Willa* of her freedmen, &c. but not to the *Willa* of their children.

regular

regular cohabitation, [*Firash*], and it is the *husband* that possesses the right of cohabitation, not the *wife*; for she is the *appropriated*, not the *appropriator*:—hence parentage cannot be established in a woman.

It is to be observed that the estate of a freed-man goes to the *Affaba* [lineal heir] of the emancipator,—to the nearest, and after him to the next of kin,—and not solely to his *children*; because inheritance does not hold with respect to *Willa*, for if such were the case, the property of the freed-man would at all events descend to the sons and daughters of the emancipator, (the sons receiving two shares each, and the daughters one,)—whereas it is not so.—Hence it is evident that inheritance does not hold in *Willa*.—*Succession*, however, holds with respect to it:—but succession cannot be established with regard to any except a person from whom proceeds protection and aid; and protection and aid are afforded by *men* only, not by *women*.—Now it being proved that the estate of a freed-man goes to the emancipator's *Affaba*,—to the nearest, and after him to the next of kin,—it follows that if a freed-man die, leaving the father and the son of his emancipator, the right of *Willa* descends to the *son*, not to the *father*, (according to *Haneefa* and *Mohammed*), because the son is the nearest *Affaba* [lineal heir];—and, in the same manner, it would go to the master's *grandfather*, not to his *brother*, (according to *Haneefa*), since (as he holds) the grandfather is the nearest of the two.—In the same manner also, the *Willa* of her freed-man descends to the *son* of his emancipatress, not to her *brother*, for her son is the nearest in lineal succession.—If, however, the freed-man were to commit an offence, the fine for it would fall upon her brother; because the offence of the freed-man is the offence of the emancipatress, and her *brother* is of her paternal kindred, whereas her son is not so.—If, also, a freed-man die, leaving a son of his master, and the children of another son, his estate goes to the *son*,

The estate of a freed man descends to the *lineal* heir of the emancipator, and not to his *heirs general*.

not to the *grand-children*, because the *Willa* descends to the nearest. This is recorded from several of the companions; and among the rest from *Amroo*, *Alee*, and *Ibn Masdood*.

SECTION.

Of the *Willa Mawalât*, or *Willa* of Mutual Amity.

Nature and
effect of a
contract of
Mawalât.

THE case of *Willa Mawalât* is where (for instance) a stranger* says to the person whose profelyte he is †, or to any other person, "I enter into a contract of *Mawalât* with you, so that if I die my property shall go to you, or if (on the other hand) I commit an offence, the fine is upon you or your *Akilâ*," and the person thus addressed assents accordingly,—in consequence of which he becomes the *Mawla* of the stranger, and upon his decease without heirs inherits his property.—The stranger is termed the *Mawla Asfal* ‡, and the person who thus accedes to the contract the *Mawla Aaila* §.—*Shafëi* maintains that a contract of *Mawalât* does not occasion inheritance in any respect, and is of no force whatever, as it tends to annul the

* Arab. *Ajimee*. This term (as has been already remarked) signifies, generally, any person not an Arab. It is also used in the same sense among the Arabs as *Barbarian* with the Greeks, or *Gentile* among the Jews. The case here stated applies to any infidel alien coming into a *Mussulman* territory under protection, and there embracing the faith, in which case it was customary for some *Mussulman* to adopt him as his profelyte.

† Literally, "in whose hands he has embraced the faith."

‡ Literally, "the inferior *Mawla*," or the client.

§ Literally, "the superior *Mawla*," or the patron.

right

right of the public treasury* ;—whence the invalidity of it with respect to any other heir; for if it were valid with respect to such, his right of heritage would be annulled;—and on this ground also it is, that (according to *Shafei*) a man's bequest of his *whole* property is invalid although the testator be destitute of heirs; for still (according to him) such bequest holds good to the amount only of a third of his property, since if it were effectual to the amount of the whole, the right of the public treasury would be annulled†.—The arguments of our doctors upon this point are twofold.—FIRST, God has said, in the KORAN, “ALLOW, TO THOSE WHO ENTER INTO CONTRACTS, “THEIR SHARE OF INHERITANCE,” which text related to contracts of *Mawalât*:—and it is also recorded that the prophet, upon being questioned concerning a certain person who had become the profelyte of another, and entered into a contract of *Mawalât* with that other, replied, “*This person is endowed with a right with regard to that man, “superior to all others, both during life and in death,*”—from which it may be inferred, that during his profelyte's life he is subject to fines on his account, and upon his decease is his heir.—SECONDLY, the property of the profelyte is this person's right, whence he is at liberty to make use of it in any manner he pleases: for the property would fall to the public treasury only from this necessity, that there are no claimants to it, not because the public treasury has any right in it.—If, however, the profelyte leave any natural heir, such heir precedes the *Mawla Mawalât*, notwithstanding he be of the *uterine* kindred, (such as a *maternal uncle* for instance;) because the two persons in question are the only parties to the contract, whence it is not binding upon any other; and an *uterine* relation is entitled to inheritance.—It is to be observed, that in the contract in question the parties must particularly

* Where a stranger dies without heirs, the whole of his property goes to the public treasury.

† He holding that, in case of a person dying without heirs, *two thirds* of his property must go to the public treasury at all events.

mention and stipulate fine and inheritance, as has been explained in the exemplification of the case. If, therefore, the stipulation of inheritance be made on *both* parts, whoever dies first inherits of the other; but if on *one* part only, heritage holds agreeably to stipulation. In the same manner also, if responsibility for fines be stipulated on both parts, each is responsible for the fines incurred by the other; but if on *one* part only, responsibility holds accordingly; for a thing is rendered obligatory only by undertaking for it; and it cannot be undertaken for but by stipulation. It is also to be observed, that it is essential, in contracts of *Mawalât*, that the *Mawla Asfal*, or client, be a stranger [*Ajmeé*,] and not an *Arab*; because among the *Arabs* aid and patronage run in families or tribes,—(that is, one *Arab* aids or patronizes another where they are both of the same tribe or family,)—whence they have no occasion for engaging in contracts of *Mawalât*.

Either party
may dissolve
the contract
in presence of
the other;

or the *inferior*
party may
break it off
in the supe-
rior's absence,
by engaging
in a *Mawalât*
with some
other person:

THE *Mawla Asfal*, or client, is at full liberty to desert from his *Mawla Aailâ*, or patron, and to enter into a contract of *Mawalât* with some other person, so long as the first shall not have paid any fine of his incurring; because a contract of *Mawalât* is, like bequest, a reversible deed.—In the same manner, also, the *Mawla Aailâ*, or patron, is at liberty to relinquish his right of *Willa*, and to break off the contract of *Mawalât*, because such a contract is not binding.—It is requisite, in case of either party dissolving the contract, that it be dissolved in the presence of the other, in the same manner as in the case of dismissing an agent, where the dismissal is express, and not implied, or virtually induced.—It is otherwise, however, where the client enters into a contract of *Mawalât* with a person in the absence of the former patron; for in this case the first contract of *Mawalât* is dissolved without the presence of the party, this being a dissolution by effect, and necessarily resulting;—in other words, the dissolution of the first contract is a necessary consequence of the formation of the second.—In this case, therefore, the presence of the other party is not requisite; in the same manner as the presence of an agent is not requisite where he is virtually dismissed from his employment, by the constituent (for instance)

stance) himself selling the article concerning which he had constituted him his agent for sale.

WHERE the patron pays the fine incurred for an offence committed by his client, the latter is incapacitated from quitting him and engaging in a contract of *Mawalât* with any other person;—because the right of another then becomes implicated; and also, because the fine was decreed by the *Kâzee*.—Besides, the fine paid by the patron on his account stands as a valuable consideration, in the same manner as the return for a gift; whence he has it not in his power to turn from his patron, in the same manner as a donor, after receiving a return, cannot recede from his gift.—In the same manner also, the child of the client cannot turn from the patron who has paid a fine on account of its father; and so likewise, if the patron pay a fine on account of the child of his client, neither the client nor his child can afterwards turn from the patron, because with regard to the *Willa Mawalât* they are as one person.

but he cannot do so, after the other has paid a fine incurred by him.

AN emancipated slave, as having a *Marwa* in his emancipator, is not at liberty to enter into a contract of *Mawalât* with any person; because the *Willa* of *Manumission* is binding, whereas the *Willa* of *Mawalât* is not so; and during the existence of a thing which is forcible and binding, a thing which is not so cannot take place.

A freedman cannot engage in a contract of *Mawalât*.

but he cannot
do so after
the other has
paid a fine
incurred by
him.

H E D A R A.

BOOK XXXIV.

Of IKRĀH, or COMPULSION.

The nature of
compulsion
defined.

IKRĀH, or compulsion, applies to a case where the compeller has it in his power to execute what he threatens,—whether he [the compeller] be the *Sultan*, or any other person, as a *thief* (for instance.)—The reason of this is, that compulsion implies an act which men exercise upon others, and in consequence of which the will of the other is fet at nought, at the same time that his power of action still remains.—Now this characteristic does not exist unless the other (namely, the person compelled) be put in fear, and apprehend that if he do not perform what the compeller desires, the threatened

evil

evil will fall upon him;—and this fear and apprehension cannot take place, unless the compeller be possessed of power to carry his menace into execution; but provided this power does exist, it is of no importance whether it exist in the *Sultan* or in any other person. With respect to what is recorded from *Haneefa*, that “compulsion cannot proceed from any except the *Sultan*,” the learned remark that this difference originates merely in the difference of times, and not in any difference of argument; for in his time none possessed power except the *Sultan*, but afterwards changes took place with respect to the customs of mankind.—It is to be observed that, in the same manner as it is essential, to the establishment of compulsion, that the compeller be able to carry his menace into execution, so likewise it is requisite that the person compelled be in fear that the thing threatened will actually take place; and this fear is not supposed except it appear most probable to the person compelled that the compeller will execute what he has threatened, so as to force and constrain him to the performance of the act which the compeller requires of him.

If a person exercise compulsion upon another, by cutting, beating, or imprisonment, with a view to make him sell his property, or purchase merchandize, or acknowledge a debt of one thousand *dirms* to a particular person, or let his house to hire, and this other accordingly sell his property, purchase merchandize, or so forth, he has it afterwards at his option either to adhere to the contract into which he has been so compelled, or to dissolve it, and take back or restore the article purchased or sold; because one essential to the validity of any of these contracts is that it have the consent of both parties, which is not the case here, as the compulsion by blows or other means rather occasions a dissent; and the contract is therefore invalid.—(This rule, however, does not hold where the compulsion consists only of a single blow, or of imprisonment for a single day, since fear is not usually excited by this degree of beating or confinement. Compulsion, therefore, is not established by a single blow, or a single day's imprisonment;

A person forced into a contract may afterwards dissolve it,

unless the means of compulsion be trifling.

The purchaser becomes proprietor of goods sold upon compulsion.

An acknowledgment extorted by compulsion is invalid;

ment;—unless the compelled be a person of rank, to whom such a degree of beating or confinement would appear detrimental or disgraceful; for with respect to such a person compulsion is established by this degree of violence, as by it his volition is destroyed.)—In the same manner, also, an *acknowledgment* extorted by any of the above modes of compulsion is invalid; because acknowledgment is a species of proof, inasmuch as truth is more probable, in acknowledgment, than falsehood; but in a case of compulsion *falsehood* is most probable, as a man will acknowledge falsely where, by so doing, he may avoid injury.

WHERE a person sells goods by compulsion, as above stated, and makes delivery of them under the influence of such compulsion, the purchaser becomes proprietor of them, according to our doctors.—*Ziffer* maintains that he does not become proprietor, because a sale by compulsion depends, for its validity, upon the assent of the feller, and a sale so circumstanced cannot endow with a right of property until such assent be signified. The argument of our doctors is that, in the case in question, the pillar of sale (signified by proposal and acceptance) has proceeded from fit persons with respect to a fit subject; the sale being merely *invalid*, from a want of one of the essentials of sale, namely, the mutual consent of the parties; and the purchaser, in an invalid sale, becomes proprietor of the article upon obtaining possession of it; whence it is that if a person take possession of a slave purchased under an invalid contract, and then emancipate him, or perform such other act with respect to him as cannot afterwards be annulled, it is valid, and he must pay the feller the value, as is the rule in all cases of invalid sale.—After the compulsion has ceased, however, if the feller signify his assent, the sale then becomes lawful and valid, because by such assent the causes of invalidity (namely, compulsion and unwillingness) are removed.

WHERE

WHERE a person thus sells his property by compulsion, he has still a right, as long as he does not signify his assent to the sale, to take back the article, although the purchaser should have sold it into the hands of another person.—It is otherwise in all other cases of invalid sale; for in those, after the purchaser has sold the article, the seller has no right to take it back; because the invalidity of sale in those cases is on account of the right of the LAW; and when the purchaser sells the article to any third person, the right of that person becomes involved in this second contract; and his right precedes the right of the LAW, as the individual is necessitous, whereas the LAW is not so.—In a case of *compulsion*, on the contrary, the invalidity of the sale is on account of the right of the seller; and as he is an individual, it follows that, in this case, notwithstanding the right of the second purchaser be involved in the second contract, still both rights are upon a *par*, as being both rights of the individual; and consequently, the right of the first cannot be annulled by the right of the second.

but the seller may resume the article, provided he does not signify his assent to the sale.

IT is to be observed that some consider a *Waffa* sale* to be invalid, in the same manner as a *compelled* sale, and apply to it the rules of sale by compulsion; whence (according to them) if the purchaser in a *Waffa* sale sell the article purchased, the sale so made by him may be broken through, as the invalidity of the sale, in this case, is on account of the non-consent of the seller, in the same manner as in a case of compulsion.—*Waffa* sale is where the seller says to the purchaser “I sell you this article in lieu of the debt I owe you, in this way, that upon my paying the debt the article is mine.”—Some determine this to be, in fact, a contract of pawn; for between it and pawn there is no manner of difference, as, although the parties denominate it a *sale*, still the intention is, in effect, a *pawn*. Now in all

Case of a *Waffa* sale.

* Literally “a *security* sale;” so termed because by it the seller insures to the purchaser the debt he owes him.

act regard is paid to the spirit and intention; and the spirit and intention of pawn exist in this instance,—whence it is that the seller is at liberty to resume the article from the purchaser upon paying his debt to him.—Some, again, consider a *Waffa* sale to be utterly null, as the purchaser, in the case in question, resembles a person in jest, since he (like a jester) repeats the words of sale, at the same time that the effect and purpose of sale are not within his design. Such sale is therefore utterly null and void, in the same manner as a sale made in jest. The *Hanefite* doctors of *Samarra*, on the other hand, hold a *Waffa* sale to be both valid and useful, as it is a species of sale commonly practised from necessity and convenience, and is attended with advantage in regard to some effects of sale, such as the use of the article, although the purchaser cannot lawfully dispose of it.

A compelled sale is rendered valid if the seller willingly receive the price;

If, in a case of compulsion, the seller take possession of the price readily and willingly, the sale is valid, as his thus taking possession of the price is an argument of its validity; in the same manner as where, in a suspended sale, the seller readily and willingly receives the price of the article, such receipt argues the validity of the sale.—So likewise, if a person advancing part of the price conclude a *Sillim* contract by compulsion, and the party who received the advance should afterwards readily and willingly deliver the article for which the advance had been paid, his so doing is an argument of the validity of the transaction. It is otherwise where one person compels another to make a gift, saying to him “make a gift of this article to such a person.”—but without adding to the word gift “and delivery,” and the person thus compelled make gift and delivery of the article to the person named; for such gift is utterly null, because the design of the compeller is that the donee shall be endowed with a right in the article upon the instant of donation; and this design cannot be obtained, in a case of gift, but by a delivery of the article to the person specified. In a case of sale by compulsion, on the other hand, the end of the compeller is obtained on the instant of compelling the party to accede to the

the *contract* of sale. *Gift* upon compulsion, therefore, comprehends a delivery of the article to the donee; whereas *sale* upon compulsion does not comprehend a delivery of the article sold to the purchaser,—whence it is that if the seller, after acceding to the contract from compulsion, make delivery of the article *without* compulsion, the sale is rendered valid by such delivery,—whereas the *gift* in question is not rendered valid by a delivery of the article to the donee.

If, in a case of compulsion, the seller take possession of the price by *compulsion*, such receipt does not render the sale valid; and it is accordingly incumbent on him to return the price to the purchaser, if it remain in his hands, because of the contract being invalid. If, however, the price have been lost, or have perished in his hands, nothing can be taken from him in lieu of it, because it was merely a *trust* with him, inasmuch as he took possession of it by consent of the proprietor, namely the purchaser.

but it is not valid if he be compelled to receive it.

If one person compel another to sell an article to a *third* person, but do not compel this person to purchase the article, and it afterwards perish in the purchaser's hands, he [the purchaser] is responsible to the seller for the value, as the article is insured in his hands, such being the law of invalid sale. It is to be observed, however, that in this case the seller is at liberty to take the compensation from the compeller; because as it was (in a manner) he who gave the article to the purchaser, it may be said that it is *he* who has lost or destroyed the seller's property. In short, the seller, in the case in question, is at full liberty to take the compensation from either of the two; in the same manner as the proprietor of an usurped article is at liberty to take his compensation from either party, where the article has first been usurped from him, and then usurped by some other from the first usurper. If, however, the seller take his compensation from the compeller, he [the compeller] is entitled to recover the value from the

A sale in which the seller is compelled but not the purchaser, leaves the latter responsible for the article, in case it be lost in his hands.

the purchaser, since, in consequence of paying the compensation for the article, he stands as substitute to the seller.—It is to be observed that, in a case of usurpation, if the usurper sell the article to *Amroo*, and he (again) sell it to *Khálid*, and he (again) sell it to *Bikroo*, and so on, from hand to hand, and the proprietor take his compensation from *Khálid* (for instance,) in this case every purchase subsequent to that of *Khálid* is legal and valid; because as *Khálid*, in consequence of paying the compensation, becomes proprietor of the usurped article, he then appears to have sold his own property; whereas every purchase made before, and even the purchase of *Khálid* himself, is invalid; because the article usurped becomes the property of *Khálid*, by retrospect, from the time only that he took possession of it. It is otherwise where similar circumstances follow a compulsive sale; for if, in such case, the party compelled (namely, the first seller) signify his assent to any one of the subsequent contracts, every other contract antecedent to that one is valid, and so likewise every subsequent contract; because the invalidity of these contracts was on account of the right of the proprietor, as he had sold his property upon compulsion; and he therefore possesses a right to resume the property, until he signify his assent: but upon his assenting to any of those contracts, he relinquishes this right; and all the contracts become valid of course.

SECTION.

IF one person use compulsion towards another, by imprisonment or blows, with a view to make him eat carrion or drink wine, still it is not lawful for the person thus compelled to eat or drink of those articles,—unless he be threatened with something dangerous to life or limb, in which case he may lawfully do so; (and the same rule obtains if compulsion be used to make a person eat *blood* or *pork*;)—because the eating of such prohibited articles is not permitted except in cases of extremity, such as famine, since in any other case the argument of illegality still endures. Now *extremity*, or *unavoidable necessity*, do not exist, to require the eating or drinking of the article, except the *not* eating it be attended with danger to life or limb; but as the eating or drinking is in such case permitted, it follows that it is so permitted where this danger is to be apprehended from imprisonment or blows. Neither is the person, who is thus put in fear, under any obligation to suffer the thing menaced; but rather, if he *do* suffer it, and refrain from eating or drinking the prohibited article until he die, or lose any of his limbs, he is an offender; because as, under such circumstances, the eating or drinking is permitted to him, it follows that, if he refuse, he is an accessary with another to his own destruction, and is consequently an offender, in the same manner as if he were to refrain from eating carrion when perishing for hunger. *Aboo Yoozaf* maintains that he would ~~not be~~ an offender from persisting, unto death or dismemberment, in his refusal; because the eating or drinking, in the case in question, is merely licensed, (since the articles still continue prohibited,)—whereas the refraining from them is an observance of the LAW; and consequently, in persisting to refuse, he acts in obedience to the LAW.—To this, however, it may be replied,

N n n 2

that

A person may lawfully eat or drink a prohibited article, upon a compulsion which threatens life or limb.

that in the case in question the illegality no longer remains; because, as a situation of *compulsion* or *indispensable necessity* is particularly excepted in the KORAN, it follows that under the circumstances here described the argument of illegality does not exist: hence the eating is positively *lawful*, and not merely *licensed*. It is to be remarked, however, that in the case in question the compelled person is an offender only where he knows the eating to be lawful and nevertheless refrains; because as its legality is a matter of a concealed nature, it follows that he stands excused, from ignorance,—in the same manner as men are excused for omissions or neglects, from ignorance, in the beginning of their conversion to the faith, or during their residence in a hostile country.

A person must not declare himself an infidel, or revile the prophet, upon compulsion, unless he be in danger of otherwise losing life or limb.

IF one person compel another to turn infidel, or to revile the prophet, by imprisonment or blows, still compulsion [in its *legal* and *exculpatory* sense] is not established; but if he menace him with something which puts him in fear, and gives room to apprehend danger to life or limb, in this case compulsion is established.—The reason of this is, that as by mere blows or imprisonment compulsion is not established with regard to eating prohibited meats, (as was before explained,) it follows that it is not established with regard to infidelity *a fortiori*, since the illegality of infidelity is much greater. When, therefore, a person is put in fear for his life or limbs, so as that compulsion is established, it is lawful for him to make an exhibition of infidelity, (that is, to repeat infidel expressions:)—and if he merely exhibit this with his lips, but keep his heart steady in the faith, he is not an offender; because when *Amâr* had fallen into the hands of the infidels, and they had compelled him to revile the prophet, he said to him, “If you find your heart still firm in the faith, your uttering infidel expressions is immaterial;—nay, if they again should compel you, you may again repeat such infidel expressions;”—and a passage in the KORAN was also revealed to the same effect. Another reason is that by uttering infidel expressions *faith* is not destroyed, since the actual faith

faith (by which is understood *rectitude of heart*;) still continues unaffected, and if he were to refuse uttering such infidel expressions he would incur actual destruction, as the infidels would in that case dismember or put him to death.—Yet if he persist in refusing unto death, he has a claim to merit, and is entitled to his reward; because *Jeel* persevered in refusing, and suffered death in consequence; and the prophet gave him the name of *Seyd al Shabeed* [the martyr,] and declared, in afterwards speaking of him, “*he is my friend in heaven*,” and also because, in thus acting, his honour is effectually preserved. A refusal, moreover, for the sake of religion, to utter any infidel expressions, is an observance of the LAW: in opposition to the case before stated, as there the eating of carrion, or so forth, is positively lawful, because of the exception cited on that subject.

If one person compel another to destroy the property of a *Mussulman*, by menacing him with something dangerous to life or limb, it is lawful for the person so compelled to destroy that property; because the property of another is made lawful to us in all cases of necessity, (such as in a situation of *famine* for instance,) and in the case in question this necessity is established.—The owner of the property must in this instance take his compensation from the *compeller*; because the compelled is merely the instrument of the compeller in any point where he is capable of being so; and the destruction of property is of that nature.

If one person compel another, by menacing him with death, to murder a third person, still it is not lawful for the person so menaced to commit the murder, but he must rather refuse, even unto death.—If, therefore, he notwithstanding commit the murder, he is an offender, since the slaying of a *Mussulman* is not permitted under any necessity whatever.—In this case, however, the retaliation is upon the compeller, if the murder be *wilful*.—The compiler of the *Hedaya* remarks that this is according to *Haneefa* and *Mohammed*; and that *Zif-*

fer,

A person destroying the property of another upon compulsion is not responsible; but the compeller is so.

A person murdering another upon compulsion is an offender; but the compeller is liable to retaliation.

fer., on the contrary, maintains that the retaliation is upon the compelled person;—whereas *Abou Yoosaf* holds that there is no retaliation upon either party,—and *Shafei* (on the contrary) contends that it is incurred by both.—The argument of *Ziffer* is, that the act of murder has proceeded from the compelled person, both *de facto* and *quo animo*, and the LAW, also, has attached to him the effect of it, namely criminality: consequently he incurs retaliation.—(It is otherwise in the case of destroying the property of another upon compulsion; since as the LAW has not attached the effect thereof, namely the criminality, to him, it is consequently referred to another, namely the compeller.) Such also is the argument of *Shafei* for awarding retaliation upon the compelled person: and his argument for awarding it upon the compeller is, that from him proceeded the moving cause of the murder, as the compulsion was the cause of it; and the moving cause in murder stands (according to him) subject to the same rule with the actual perpetration;—as in the case of witnesses whose evidence induces retaliation; in other words, if two witnesses give evidence of a wilful murder, and in conformity with their testimony retaliation be executed upon the accused, and the person to whose murder they had borne testimony afterwards prove to be still living, those witnesses are then put to death in retaliation. The argument of *Abou Yoosaf* is that concerning the propriety of awarding retaliation upon the compelled person there is a doubt; and, in the same manner, there is also a doubt concerning the propriety of awarding it upon the compeller; for in one way the view is to fix the murder upon the compelled, because of his being an offender, and it is also fixed upon the compeller, because of his being the mover:—thus a doubt opposes itself with respect to each; and hence neither of them is liable to retaliation. The argument of *Haneefa* and *Mohammed* is that the compelled person is, in this instance, forced to the commission of the murder by a natural instinct, which leads a man to prefer his own life to that of another; and he must therefore, as far as is possible, be regarded as the instrument of the compeller. He is accordingly considered as his instrument

in the commission of the murder, in the manner of a weapon. He cannot, however, be his instrument with regard to the *criminality* of the murder, in such a way as that no part of the criminality would attach to himself, but the whole be imputable to the compeller; and hence the murder, with regard to its criminality, is restricted to the person compelled.—This is therefore in some measure analogous to a case of compulsive manumission,—or of a person compelling a *Magian* to slaughter* a goat; that is to say, if one person compel another to emancipate his slave, and he emancipate him accordingly, in this case the emancipation is referred and imputed to the compeller, whence he is answerable for the value of the slave,—but the emancipation is imputed to the compelled with regard to the *execution* of it, for if it were in this respect also imputed to the compeller, the slave would not become free;—and, in the same manner, if a person compel a *Magian*, or other idolator, to slaughter the goat of another, his act is referred and imputed to the compeller, with regard to the destruction of the property, but not with regard to a lawful *Zabbah*, whence the goat is prohibited and carrion;—and so likewise, in the case in question, the act of the compelled person is imputed to the compeller with respect to the *destruction*, not with regard to the *criminality*.

If one person compel another to divorce his wife, or to emancipate his slave, and this person accordingly divorce his wife or emancipate his slave, such divorce or emancipation takes effect, according to our doctors: in opposition to the opinion of *Shafeï*, as has been already stated under the head of DIVORCE.—In the case of compulsive manumission, the person compelled is entitled to take the value of the slave from the compeller, because as in this case the compelled admits of being considered as the instrument of the compeller with regard to the destruction of property, to him such destruction is accordingly referred and imputed. Hence he is at liberty to seek a compensation from the

Case of compelled divorce or emancipation.

* Arab. *Zabbah*. (It is fully explained under its proper head.)

compeller,

compeller, whether rich or poor; and the slave is not liable to emancipatory labour, as that could only be due from him either with a view to his emancipation, or on account of the right of some other person being involved in him, neither of which motives exist in the present instance.—It is also to be observed that the compeller, in this case, is not entitled to take from the slave his value as paid to his proprietor; because as he [the compeller] is sued on the score of a *destruction* of the slave, it may therefore be said that he has (as it were) murdered or made away with the slave; and he [the slave] consequently cannot be responsible.—In the case of compelled divorce, also, the person compelled is entitled to take from the compeller half the dower, provided the divorce be before consummation;—or, if no dower was mentioned in the marriage contract, he may take from him that for which he is himself in such case responsible, namely a *Matâr*, or *present*, as that is what he incurs by the divorce*.—It is otherwise where the compelled divorce is pronounced *after* consummation; for in that case the dower has been already made due by the consummation, and is not made so by the divorce.

Case of a compelled appointment of agency for divorce or emancipation.

If a person, upon compulsion, create another his agent for divorce or emancipation, and the agent divorce the wife, or emancipate the slave, of the person thus compelled to authorize him, such divorce or manumission is valid, on a favourable construction; because a *compelled* contract or commission, provided it be such as is rendered invalid by involving an invalid condition, is invalidated by the compulsion; but a commission of agency is *not* rendered invalid by involving an invalid condition.—In the case of divorce, the compelled constituent is entitled to take half the dower from the compeller,—and, in the case of manumission, to take from the compeller the value of the slave; because in both cases the end and design of the compeller was to destroy the constituent's right of property, in performing the act for which he appointed him agent.—It is to be observed, as a rule, that in all deeds or contracts which, after engagement, do not admit of reversal or dis-

No deed, in itself irrevocable, can be

* See Vol. I. p. 125.

solution, compulsion has no effect whatever, but they are equally obligatory and valid under compulsion as otherwise. Hence compulsion has no operation upon a vow, since this (unless it be of a *suspended* nature) is incapable of dissolution; and accordingly, the person compelled into such a vow is not entitled to take any thing whatever from the compeller in consideration of the loss he incurs by such vow.—In the same manner, also, compulsion is attended with no effect in oaths, or in *Zihar*, as those do not admit of retraction; and reversal of divorce and *Aila* are also subject to the same rule, as well as a recantation of an *Aila* oath at the time of making the asseveration.—In *Kheela*, also, as being a suspension of divorce on the part of the husband, (for he suspends it on the payment of the consideration,) compulsion is attended with no effect, since it is incapable of reversal or dissolution; and accordingly, if the husband be compelled into it, not the wife, she is answerable for the consideration, since she assents to it, as having undertaken for it without compulsion.

retracted after being executed by compulsion.

If a person, upon compulsion, commit whoredom, he is liable to punishment, according to *Haneefa*,—except where the compeller is a *Sultan*.—The two disciples, on the contrary, maintain that he is not liable to punishment in either case.

Whoredom by compulsion incurs punishment.

If a person, upon compulsion, become an apostate by pronouncing a renunciation of the faith, yet his wife is not separated from him; because apostacy has a connexion with belief, whence if his mental faith continue firm, he does not become an infidel by the mere verbal renunciation.—In the case in question, moreover, his infidelity is dubious, and consequently his wife is not separated from him, because of the doubt.—If, therefore, the husband and wife differ, the insisting that she has been separated, and he that his renunciation was only pronounced outwardly, but that his faith still remains firm, his declaration must be credited; because a declaration of apostacy is never used with a view to effect a matrimonial separation, but merely signifies a

Case of apostacy upon compulsion.

change of belief; and the compulsion, on the other hand, affords an argument that the belief has not been altered:—consequently his declaration must be credited.—It is otherwise with respect to a man turning *Mussulman* upon compulsion; as a man who embraces the faith upon compulsion is nevertheless admitted to be a *Mussulman*, because of the possibility that his faith accords with his words.—In short, in both cases (namely, compulsion to apostacy, and compulsion to *Islâm*) a preference is given to *Islâm*, as it is the superior, and cannot be overcome.—What is here advanced relates merely to the award of the *Kâzee**; for with God, if the person do not believe in his heart, he is not a *Mussulman*.

Case of *Islâm*
upon com-
pulsion.

If a person become a *Mussulman* upon compulsion, so as to be decreed a *Mussulman*, and afterwards apostatize, still he is not worthy of death, since his *Islâm* is doubtful, and doubt prevents the execution of death upon him.

Case of a hus-
band acknow-
ledging his
having apos-
tatized upon
compulsion.

If a person, after having made, upon compulsion, a declaration of infidelity, should say to his wife, who claims a separation, “I said a thing in which I was not serious,” (in other words, “I spoke falsely,”) in this case his wife is separated from him in the conception of the *Kâzee*†, and he [the *Kâzee*] must issue a decree accordingly, although there be no separation before God.—The reason of this is, that from his acknowledgment it is established that he was not compelled into his declaration, but made it without compulsion, as the compeller used compulsion towards him *not* with a view to extort the declaration from him, but with a view to make him change his faith; and as he, of his own choice, made the declaration of infidelity, and his wife claims a separation, his allegation that “he intended nothing” cannot be credited with the *Kâzee*, who must therefore issue a decree of separation, although there be no separation in the sight of God.—

* That is, “relates to the mere point of law.”

† That is, “in the eye of the LAW.”

If, on the other hand, he allege that “ he intended merely to fulfil
 “ the design of the compeller, namely, *to make a declaration of infi-*
 “ *delity*, at the same time that he spoke under a mental reservation,”
 in this case his wife is separated from him both with the *Kázee*, and
 also in the sight of God; because in this case he appears to have made
 a *serious declaration of infidelity*, notwithstanding he may have screened
 himself under the mental reservation.—In the same manner, if a per-
 son compel another to worship a cross, or to revile the holy person of
 the prophet, and he do so accordingly, and afterwards plead that “ his
 “ design in worshipping was the worship of God,”—or “ by *Mohammed*
 “ he meant some other than the prophet,” his wife, claiming separa-
 tion, is separated from him with the *Kázee*, but not in the sight of
 God;—whereas if he were thus to worship a cross, or to revile the
 prophet, under a mere mental reservation, his wife would be separated
 from him both with the *Kázee*, and also in the sight of God, for the
 reasons above stated.

H E D A Y A.

B O O K XXXV.

Of *H I Y H R*, or *I N H I B I T I O N*.

Definition of
the term.

H I Y H R, in its primitive sense, means interdiction or prevention. In the language of the LAW it signifies an interdiction of action, with respect to a particular person, who is either an infant, an idiot, or a slave,—the causes of inhibition being three,—infancy, insanity, and servitude.

Chap. I. Introductory.

Chap. II. Of Inhibition from Weakness of Mind.

Chap. III. Of Inhibition on account of Debt.

CHAP.

CHAP. I.

THE acts* of an infant are not lawful unless authorized by his guardian, nor the act of a slave unless authorized by his master;—and the acts of a lunatic, who has no lucid intervals, are not at all lawful. The acts of an *infant* are unlawful, because of the defect in his understanding; but the license or authority of his guardian is a mark of his capacity; whence it is that in virtue thereof an infant is accounted the same as an adult. The illegality of the acts of a female or male slave is founded on a regard to the right of the owner;—for if their acts (such as purchase and sale) were valid and efficient, they would be liable to debt, and their creditors might appropriate their acquisitions, or even sell their persons for the discharge of their demands, whence the master's advantage would be defeated. If, however, the master signify his assent to their acts, he thereby agrees to the destruction of his right. With respect to the acts of a *lunatic*, they are not lawful under any circumstance, as he is utterly incompetent to act at all, although his guardian should agree to his so doing. It is otherwise with respect to a slave or an infant; for a slave is possessed of personal competency, and there is hope of an infant in due time attaining that competency,—whence there is an evident difference between those and lunatics.

Inhibition
operates upon
infants,
slaves, and
lunatics;

If a slave, an infant, or a lunatic, should sell or purchase any article, knowing at the time the nature of purchase and sale, and intending one or other of those, the guardian, or other immediate superior, has it at his option either to give his assent if he see it advise-

whence purchase or sale by them requires the assent of their immediate superior:

* Arab. *tesferrif*, meaning *transactions* of any kind, such as purchase, sale, or so forth.

able, or to annul the bargain; because, as the controul and suspension with regard to the acts of a slave are on account of the right of his master, it follows that he has an option with respect to them; and as the same controul and suspension as to the acts of an infant or a lunatic are with a view to the security of their interest, their guardians are therefore to examine and attend to what may be good for them in their acts. It is requisite, moreover, that the persons here described know the nature of sale, in order that the pillar of the contract may exist, and the sale be concluded so far as to remain suspended upon the guardian's consent;—and a lunatic sometimes knows the nature of sale, and designs it, although he be incapable of distinguishing between the profit and loss attending it.—(A lunatic of this description is termed a *Matooá*;—and his agency is likewise valid,—as has been already mentioned in treating of agency.)

OBJECTION.—Suspense obtains only in sale; the original rule in purchase being that it takes effect upon the agent*: but in the present instance, *purchase* by an infant or a lunatic depends upon the assent of the guardian, in the same manner as *sale* by them.

REPLY.—The non-suspence of purchase is only where its taking effect upon the agent is possible, as in the case of purchase by a *Fazoollee*, or unauthorized person: but in the case in question it is impossible that the purchase should take effect upon the agent, because of his incompetency where he is an infant or a lunatic, and because of the injury to the master where he is a slave.—*Purchase* by them, therefore, is also suspended.

but it operates upon them with respect to

—It is to be observed that the three disqualifications in question, namely infancy, insanity, and servitude, occasion inhibition with respect to *words*, but not with respect to *acts*†; because acts, upon pro-

* Arab. *Mobàshir*; meaning the *actor* or *performer* of any thing; whence, in treating of crimes, it is translated the *perpetrator*. (The translator thinks it is proper to explain this distinction, because of the equivocal nature of the term *agent*.)

† Arab. *Ifyál*. Meaning *overt* acts, such as a destruction of property, and so forth.

ceeding from the actor, are existent and perceptible, whereas mere words, such as purchase, sale, and so forth, are accounted existent only where they are of lawful force and authority, which depends upon the *design* of them, a thing which, in the case of infants and lunatics, is not regarded, because of their want of understanding; nor in the case of slaves, because of the injury to their master.—In short, the disqualifications here considered occasion inhibition with respect to *speech*, but not with respect to *actions*;—unless, however, those be of such a nature as to induce an effect liable to prevention from the existence of a doubt, such as punishment or retaliation, in which case infancy or lunacy occasion inhibition; whence it is that infants or lunatics are not liable to punishment or retaliation, since no regard is paid to their design.

words only,
not with re-
spect to *acts*.

No contract entered into, nor acknowledgment made by an infant or lunatic is valid, for the reasons before assigned;—and, in the same manner, divorce or manumission pronounced by them does not take place, the prophet having said, “*every divorce takes place except that pronounced by an infant.*”—It is to be observed, moreover, that manumission is peculiarly prejudicial:—and an infant does not understand the nature of divorce, as not being capable of desire; and his guardian cannot possibly know whether the infant and his wife may not agree together after he attains maturity.—Hence the divorce or manumission pronounced by an infant are not suspended, in their effect, upon the consent of the guardian. If, also, the guardian himself pronounce a divorce upon the infant’s wife, or grant manumission to his slave, it does not take place:—in opposition to other acts, such as purchase, sale, and so forth.

All contracts
or acknow-
ledgments by
an infant or
lunatic are
invalid; and
so likewise
divorce or
manumission
pronounced
by them,

or by their
guardians on
their behalf.

If an infant or a lunatic destroy any thing, they are liable to make a recompence, in order that the right of the owner may be preserved. The ground of this is that destruction occasions responsibility, independent of the intention or design;—as where, for instance, a man’s property

They are re-
sponsible for
destruction of
property.

property is destroyed, from being fallen upon by a person walking in his sleep, or from the falling of an inclined wall, after due warning; in which cases the sleeper or the owner of the wall are responsible, although they did not *design* the destruction.

Acknowledgment by a slave affects himself, not his master; and takes effect upon him on his becoming free,

AN acknowledgment made by a slave is efficient with respect to the slave himself, because of his competency; but it is inefficient with respect to his master, from tenderness to his right; for if he were liable to be affected by it, the debt or obligation contracted by the slave's acknowledgment would attach to his [the slave's] person or to his acquisitions, which would be destructive of his [the master's] property.—If, therefore, a slave make an acknowledgment concerning property, such property is obligatory upon him after he shall become free; because a slave is in himself competent to make a valid acknowledgment, the validity of which is however obstructed by the right of his master; but that right is extinguished upon his becoming free, and consequently the obstruction then ceases to exist.

or on the instant, if it induce punishment or retaliation.

IF a slave make an acknowledgment inducing punishment or retaliation, those are executed upon him on the instant, since he is accounted free with respect to his *blood*, whence it is that his master's acknowledgment affecting his blood is not admitted.

Divorce pronounced by him is valid.

DIVORCE pronounced by a slave is valid and efficient, because of the saying of [the prophet] before quoted, and also because the prophet has said, "*a slave and a MOKÂTIB are not masters of any thing except divorce.*"—Besides, as a slave knows what is adviseable for him with regard to divorcing his wife, he is therefore competent to that act. His master's right of property in him, moreover, or the advantage he derives from his services, are not liable to be thereby lost or defeated.—Divorce by a slave is therefore lawful and effectual.

CHAP. II.

Of Inhibition from Weakness of Mind*.

HANEERA has declared it as his opinion that there is no inhibition upon a freeman who is sane and adult, notwithstanding he be a prodigal†; and also, that the acts of such a person, with regard to his property, are valid, although he be one of an extravagant and careless disposition, who throws away his property on objects in which neither his interest nor his inclination are concerned. A *prodigal* [*Safeeya*] signifies one who in consequence of a levity of understanding acts merely from the impulse of the moment, in opposition to the dictates of the LAW and of common sense.—*Abou Yoozaf, Mohammed, and Shafei*, maintain that a prodigal is under inhibition, and is interdicted from acting with his own property, as he expends his substance idly, and in a manner repugnant to the dictates of reason. Hence he is placed under inhibition, for his own advantage, because of the analogy between him and an infant:—nay, he is to be inhibited rather than an infant, since in an infant carelessness and extravagance are only to be apprehended, whereas in him they are certain,—whence it is

Inhibition,
with respect
to a prodigal.

* Arab. *Fisad*; meaning (in this place) any species of mental depravity, (not occasioned by a defect of understanding,) or the practice of any folly, such as *extravagance*, or so forth.

† Arab. *Safeeya*. According to the lexicons it signifies *light-minded*. *Prodigal* may appear, in many places, to be rather too *harsh* a term. The word might more literally be rendered *indiscreet*, it being frequently opposed, in the sequel, to *Rasheed*, a *discreet* person. As, however, the translator does not recollect any substantive in our language perfectly correspondent with this idea, he has thought it advisable to adopt that term which most nearly answers to the definition of the *Mussulman* doctors, although it be not precisely what he could wish.

that he is not entrusted with the care of his own property. Besides, if he were not under inhibition, there would be no advantage in withholding his property, since in such case he might still destroy what is kept from him, by his words or declarations. The argument of *Haneefa* is that as a prodigal is still supposed to be a person *naturally* endowed with sense and understanding, as much as one who acts discreetly, he therefore is not subject to inhibition any more than a *prudent* person. The ground of this is, that if the prodigal were subject to inhibition, (that is, if his power of acting were doubted,) he would be excluded from humanity, and connected with brutes, an exclusion still more injurious to him than any extravagance of which he could be guilty; and to remedy the smaller evil by the greater would be absurd. If, however, in laying an inhibition upon a freeman who is sane and adult any *general* evil be remedied, (such as in disqualifying an unskilful physician, or a profligate magistrate, or a mendicant impostor,) the inhibition is lawful, (according to what is reported from *Haneefa*,) since in this instance the smaller evil is used to remedy the greater, which is just and reasonable. With respect to the argument for inhibition upon a prodigal, from the circumstance of his not being entrusted with his own property, it is not admitted, since inhibition is a still greater hardship upon him than withholding his property; for the legality of the *smaller* hardship does not prove the *greater* hardship to be legal. In the same manner, also, the analogy adduced between a prodigal and an *infant* is not admitted, since an infant is incapable of pursuing his own advantage, whereas a prodigal is capable of so doing. Besides, although in subjecting the prodigal to inhibition his interest and advantage be consulted, still, however, the LAW exhibits in one particular a tenderness towards him, by enabling him to pursue his own advantage, which he acts contrary to only from the vice or folly of his disposition. In withholding his property from him, moreover, there is one particular advantage; for the dissipation of property by extravagance chiefly consists in making idle and unnecessary donations; and as his making these must depend upon the property being in his hands,

hands, there is therefore an evident advantage in detaining it from him.

If a magistrate lay an inhibition upon a prodigal, and the matter be referred to another magistrate, and he annul the inhibition, and leave the prodigal at full liberty, it is lawful; for the inhibition imposed by the former magistrate is merely an *opinion*, [*Fitwa*,] not a *decree*, since to a judicial decree a plaintiff and a defendant are requisite, and those do not exist in the present instance. Besides, if the act of the magistrate, in thus imposing an inhibition, be considered as a *decree*, there is a difference concerning its being actually such, as *Haneefa* is not of this opinion. It is, however, incumbent upon the second magistrate, in this instance, to maintain the virtue of the sentence [of inhibition,] in order that it may continue in force;—and accordingly, if the prodigal perform any act after inhibition, and the act in question be referred to the magistrate who imposed the inhibition, (or to any other,) and this magistrate issue a decree annulling such act, and again the matter be referred to *another* magistrate, he is bound to uphold and adhere to the sentence of the first magistrate, and not to annul it; for as the first or other magistrate, upon the matter being referred to them, had confirmed and subscribed to the sentence of inhibition, it cannot afterwards be reversed.

may be imposed by one magistrate, and removed by another.

HANEefa has delivered it as his opinion, that if an infant be a prodigal at the time of his attaining maturity, his property must not be delivered to him until he be twenty-five years of age:—(still, however, if he should perform any act with respect to his property prior to that period, it takes effect, since, according to *Haneefa*, prodigals are not liable to inhibition:)—but upon compleating his twenty-fifth year, his property must be delivered to him, although his discretion should not be ascertained. The two disciples maintain that his property must not be delivered to him until such time as his discretion be fully known; and that in the interim all acts performed by him are

The property of a prodigal youth must be withheld from him until he attain twenty-five years of age:

invalid; for as mental imbecility is the occasion of the obstacle to his power of action, it follows that the obstacle continues as long as the occasion of it remains;—as in the case of an infant, who remains subject to inhibition during the continuance of his infancy. The argument of *Haneefa* is that withholding the property from the person in question is intended to operate merely as instruction or as a species of discipline; and it is most probable that a person, after attaining the age mentioned, will not be disposed to receive instruction, since it frequently happens that a man arrived at those years is a grandfather, his son having a son born to him: hence in withholding his property there is no advantage whatever, since the view in withholding it is to make him submit to instruction, which upon his attaining the age mentioned can no longer be answered;—and it is therefore indispensable that his property be delivered to him. Besides, the reason for withholding his property from the person in question after he has attained maturity, is in consideration of the vestiges or remaining impressions of infancy;—and as these continue only in the beginning of maturity, and are terminated by time, it follows that upon a time passing sufficient for this purpose, his property must be delivered to him;—whence *Haneefa* maintains that if an infant be discreet at the time of his majority, and afterwards become prodigal, still his property must be delivered to him, since the prodigality, in this instance, cannot be regarded as a vestige of infancy. It is to be observed that as, according to the tenets of the two disciples, an inhibition upon the prodigal in question is valid, it follows that a *sale* concluded by him is of no effect, in order that the advantage proposed in the inhibition may be obtained. If, however, the sale be deemed adviseable, the magistrate must give his assent to it; because here the sale possesses all the essentials of sale, being suspended in its effect merely for the advantage of the prodigal, and from a regard to his interest; and as the magistrate is appointed to his office for the purpose of watching over and consulting the interest of the individual, it is therefore requisite that he examine whether the sale be adviseable, in the same

manner as it is his duty to investigate into a sale made by an infant who intends and is acquainted with the nature of sale.

If the prodigal, considered in the preceding example, conclude a sale before any inhibition has been laid upon him by the magistrate, such sale is valid, according to *Abou Yoosaf*, since (agreeably to his tenets) to render the acts of the prodigal invalid, it is requisite that the magistrate lay an inhibition upon him, in order that inhibition may be fully established. According to *Mohammed*, on the contrary, the sale in question is unlawful, since (agreeably to his tenets) the prodigal is in fact under inhibition after majority, as the cause of inhibition, namely prodigality, stands in the place of infancy. The same difference of opinion obtains concerning an infant who is discreet at the time of attaining majority, and afterwards becomes prodigal.

but a sale concluded by him after majority, and before inhibition, is valid;

If the prodigal in question emancipate his slave, it is valid and effectual, and the slave becomes free, according to the two disciples; whereas according to *Shafei* it is not effectual. In short, it is a rule with the two disciples that every act liable to be affected by jesting is also liable to be affected by inhibition, as (on the contrary) any act not affected by jesting is not affected by inhibition; for a prodigal is, in effect, a jester, inasmuch as the words of a jester, spoken to an unwise or absurd effect, proceed from mere passion or waywardness, not from a want of understanding, and the same also of a prodigal; and as manumission is one of those things not affected by jesting, but valid even when spoken in jest, so in the same manner manumission pronounced by a prodigal is valid. With *Shafei*, on the contrary, it is a rule that inhibition in consequence of prodigality is in effect the same as inhibition in consequence of servitude; (whence it is that after inhibition in consequence of prodigality no act whatever of the prodigal is valid except divorce, which is effectual in the same manner as divorce pronounced by a slave;) and as manumission by a slave is invalid, so in the

and he may grant manumission,

the same manner is manumission by a prodigal. It is to be observed that as, according to the two disciples, a manumission pronounced by the prodigal is valid, the slave therefore owes to his master (the prodigal) emancipatory labour to the amount of his whole value; because inhibition is laid upon the master with a view to his interest and advantage; and as the preservation of his interest by a rejection of the manumission itself is impossible, it must therefore be rejected so far as to subject the slave to emancipatory labour for his full value; in the same manner as holds in the case of inhibition with respect to a dying person; for if a dying person emancipate his slave, he [the slave] must perform emancipatory labour on behalf of the creditors, where the person was involved in debt, or on behalf of the heirs, for two thirds of his value, where he died free from debt. It is elsewhere recorded, from *Mohammed*, that emancipatory labour is not incumbent upon the slave thus emancipated by his master, being a prodigal; for, if it were due from him, it could only be so on behalf of the emancipator; and the LAW does not authorize the obligation of emancipatory labour on behalf of the *emancipator*, but of *others*.

or *Tadbeer*,

If the prodigal in question constitute his slave a *Modabbir*, it is lawful; because *Tadbeer* gives a *title* to manumission; and as actual manumission, proceeding from a prodigal, is valid, that which merely *entitles* to it is certainly valid.—Emancipatory labour, however, is not incumbent upon the *Modabbir* during the prodigal's life, since he still continues his property. But if the prodigal die, without discretion having been ascertained in him, the *Modabbir* is in that case to perform emancipatory labour [to the prodigal's heirs or creditors, as the case may be,] for the value he bore as a *Modabbir*; because he becomes free upon his master's decease, at which time he is a *Modabbir*, and the case is therefore the same as if the master had first constituted him a *Modabbir*, and then emancipated him.

If

IF the prodigal's female slave bring forth a child, and he claim it, the parentage is established in him, and the child is free, and the mother becomes his *Am-Walid*; for as the prodigal has occasion to make the claim in question, with a view to posterity, he is therefore accounted a *discreet* person with respect to the claim of offspring advanced by him.

or claim a
child born of
his female
slave,

IF the prodigal's female slave be not in possession of any child, and the prodigal avow her to be his *Am-Walid*, she accordingly becomes his *Am-Walid*, to this effect, that he has it not in his power to sell her. If, however, the prodigal die, she must perform emancipatory labour [to his heirs or creditors] for her whole value; because his avowal of her being *Am-Walid* is the same as his acknowledgment of her being free, since the child, which would be an evidence of her freedom, does not exist in this case; and as, if he had declared her to be free, she would owe emancipatory labour, so likewise in the present instance. It is otherwise, in the example before stated, (where the child is supposed to be existing,) since in that case an evidence exists of the slave being free. Analogous to this example is the instance of a dying person laying claim to a child born of his female slave; for in that case also the same rules prevail.

or create his
female slave
Am-Walid,
independant
of such claim.

IF the prodigal here treated of marry any woman, such marriage is legal and valid; because jesting has no effect in matrimony; and also, because marriage is one of his original indispensable wants. If, also, he specify any dower, it is valid to the amount of the woman's *proper* dower, as that is one of the pertinents of marriage; but any thing beyond the proper dower is null, since for that there is no occasion, it being binding only in consequence of specification, which in this instance is no way advantageous to the prodigal:—the excess therefore is invalid, in the same manner as where a person affected with a mortal disease marries, and specifies a dower greater than the *proper* dower. If, also, he divorce his wife before consummation, an
half

He may also
marry.

half dower is due to the woman from his property, as his specification of a dower is valid to the amount of the *proper* dower. In the same manner also, if he marry four wives, or a new wife every day, it is valid, for the reasons above specified.

Out of his property is paid *Zakât*; and also maintenance to his parents, children, &c.

ZAKÂT is levied upon the property of the prodigal in question, as *Zakât* is incumbent upon him. In the same manner also, subsistence is provided to his parents and children, his wife or wives, and all relations who have a claim upon him for maintenance; because the preservation of his wife and children is among his essential wants, and maintenance is due to his relations by right of affinity; and no person's right is annulled by his prodigality. It is to be observed that it is the *Kâzee's* duty to give the amount or proportion of *Zakât* into the prodigal's hands, in order to his expending it upon the proper objects of *Zakât*; for as *Zakât* is a matter of piety, intention is therefore requisite in the payment of it. The *Kâzee* must, however, depute one of his *Ameens* to see that the *Zakât* be applied to its proper objects;—and in the case of maintenance to relations, he must pay the necessary sum into the *Ameen's* hands, that he may distribute the same among those entitled to maintenance; for as this duty is not a matter of piety, the intention of the donor is not requisite in the fulfilment of it. It is otherwise where the prodigal swears, or makes a votive engagement, or pronounces a *Zihâr* upon his wife; for in these cases he does not forfeit any property, but has only to perform an expiation for his oath, vow, or *Zihâr*, by fasting, this expiation being incurred by his own act; and therefore if his performance of expiation by a payment of property were required, he would be allowed *himself* to expend his property to the degree necessary;—but it is not so where any thing is due from him *not* incurred by his own act, such as *Zakât*, and so forth.

He cannot be prevented from per-

If the prodigal be desirous of performing the ordained pilgrimage, he must not be prevented, since this is a matter rendered incumbent

upon

upon him by a commandment of God, independant of any act on his part. The *Kāzee* must not, however, entrust to him the sum requisite for his travelling expences, but must lodge it in the hands of some trusty person among the pilgrims, to provide him a maintenance out of it upon the journey; for otherwise he would throw it away, or expend it on something not relating to pilgrimage.—In the same manner also, if the prodigal be desirous of performing the *Amrit**, he must not be prevented; for as concerning the obligation of that there is a difference of opinion, caution dictates that no obstruction be offered to the observance of it.—In the same manner also, if he be desirous of performing a *Kirān*†, he must not be prevented, since by *Kirān* is understood the performance of *Amrit* and pilgrimage‡ in one journey; and as he is not prevented from performing those separately, it follows that he is not to be prevented from performing the whole in one journey.

forming pilgrimage.

If the prodigal fall sick, and make a variety of bequests to pious and charitable purposes, they hold good to the amount of a third of his whole property; for rendering them valid is advantageous to him, since when the bequests take effect he has no longer any occasion for the property; and those bequests are used as a mean either of manifesting the testator's gratitude to God, or of acquiring merit in his sight.

His bequests (to pious purposes) hold good.

Our doctors are of opinion that no inhibition is to be imposed on a reprobate [*Fāsik*] with respect to his property, provided he be en-

There is no inhibition upon a *Fāsik*.

* This is also pronounced *Omārah*. It applies to certain ceremonies used by the pilgrims at *Mecca*, namely, compassing the *Kāba*, or temple, seven times, and running between *Siffā* *Mirwā*, which must be performed before the visitation to the temple: but concerning the necessity of those observances there is a difference of opinion among the *Mussulman* doctors.

† *Kirān* signifies performing the ceremonies of pilgrimage in company with others.

‡ As the *Amrit* is not regarded as an essential part of pilgrimage, that and the visitation to the temple (properly termed the pilgrimage) are considered under different heads.

dowed with discretion;—and *original* or *supervient* depravity of manners are alike as far as regards this rule. *Shafei* maintains that inhibition is to be imposed upon a person of this description as a punishment, in the same manner as on a prodigal; whence it is that (according to him) an unjust person is incapable of exercising jurisdiction or bearing evidence.—The arguments of our doctors upon this point are twofold. FIRST, the word of God, in the KORAN, says “WHENEVER YE PERCEIVE THEM TO BE DISCREET, DELIVER TO THEM THEIR PROPERTY;”—and the reprobate, in the case in question, is supposed to be discreet with regard to the expenditure of his property. SECONDLY, a reprobate (according to our doctors) is competent to exercise authority, as being a *Mussulman*, and is consequently empowered to act with regard to his own property.

People are liable to inhibition from carelessness in their affairs.

THE two disciples allege that the *Kâzee* is at liberty to lay an inhibition upon persons on account of carelessness or neglect in their concerns, although they be not *prodigal*. Their argument is that an inhibition imposed upon a person of this description is advantageous to him. *Shafei* concurs with the two disciples in this opinion.

SECTION.

Of the TIME of attaining PUBERTY*.

The puberty of a boy is established by circumstances, or

THE puberty of a boy is established by his becoming subject to nocturnal emission, his impregnating a woman, or emitting in the act of coition; and if none of these be known to exist, his puberty is not

* Puberty and majority are, in the *Mussulman* law, one and the same.

established,

established, until he have compleated his eighteenth year.—The puberty of a girl is established by menstruation, nocturnal emission, or pregnancy; and if none of these have taken place, her puberty is established on the completion of her seventeenth year. What is here advanced is according to *Haneefa*. The two disciples maintain that upon either a boy or girl compleating the fifteenth year they are to be declared adult; there is also one report of *Haneefa* to the same effect; and *Shafëi* concurs in this opinion.—It is also reported, from *Haneefa*, that to establish the puberty of a boy *nineteen* years are required.—Some, however, observe that by this is to be understood merely the completion of eighteen years and the commencement of the nineteenth; and consequently, that this report perfectly accords with the other. Some, again, affirm that this is not the sense in which the last report is to be received; for there have been other opinions reported from *Haneefa* on this point, different from that first recited as above; because some authorities expressly say that (according to him) the puberty of a boy is not counted by years until he shall have compleated his nineteenth year. It is to be observed that the earliest period of puberty, with respect to a boy, is *twelve* years, and with respect to a girl, *nine* years.

upon his attaining eighteen years of age;—and that of a girl, by circumstances, or upon her attaining seven-teen years of age.

A delict not liable to inhibition;

not an act of property but an act of inhibition;

but he may be imprisoned.

WHEN a boy or girl approaches the age of puberty, and they declare themselves adult, their declaration must be credited, and they become subject to all the rules affecting adults; because the attainment of puberty is a matter which can only be ascertained by their testimony; and consequently, when they notify it, their notification must be credited, in the same manner as the declaration of a woman with respect to her courses.

Their declaration of their own puberty, at a probable season, must be credited.

C H A P. III.

Of Inhibition on account of Debt.

A debtor is
not liable to
inhibition;

nor can his
property be
made the sub-
ject of any
transaction:

but he may be
imprisoned.

HANBEFA is of opinion that no person can be laid under inhibition on account of debt. If, therefore, a debt be proved against any person, and the creditors require the *Kázee* to imprison him and lay him under inhibition, still the *Kázee* must not do the latter; because as laying him under inhibition is a destruction or suspension of his competency, it is not therefore allowable for the remedy or removal of a particular injury. If, also, the debtor be possessed of property, still the *Kázee* is not at liberty to perform any act with it*, as this would be a species of inhibition, and his thus acting with the property would, moreover, be an act of conversion without the assent of the proprietor, and consequently null, according both to the *KORAN* and the *Sonna*. It is, however, requisite that the magistrate imprison the debtor, and hold him in durance, until such time as he sell his property for the discharge of his debts, and the rendering of justice. The two disciples say, that if the creditors require the *Kázee* to impose an inhibition upon their insolvent debtor, it is requisite that he impose an inhibition upon him accordingly, and prevent him from selling, or transacting, or making acknowledgments, in order that his creditors may not sustain an injury; because restriction is imposed upon a *prodigal* only out of a regard for his interest; and in imposing the same upon a debtor a regard is manifested to the interest of his creditors; for if an inhibition upon him were not authorized, it is not improbable

That is, to purchase, or sell with it, &c.

that

that he might act collusively, or, in other words, might declare that "the property in his possession belong to a particular person," notwithstanding it actually belongs to himself and not to the other, his declaration being made merely with a view that the property might not go to his creditors,—whence the right of the creditors would be defeated.—(It is to be remarked, that what the two disciples say of an inhibition being laid upon the debtor with respect to *sale*, applies only to the sale of any thing for a price short of its real value; as the right of the creditors is not injured by his selling an article for an adequate price. Besides, the prohibition of the sale exists only on account of the creditors' right; and as their right is not annulled by such a sale, he need not be prohibited from concluding it.)—It is also lawful (according to the two disciples) for the *Kāzee* to sell the debtor's property, where he himself declines so doing, and to divide the price of it among the creditors in proportion to their respective claims; because it is incumbent upon the debtor to sell his property for the payment of his debt; and consequently, upon his declining so to do, the *Kāzee* is his substitute for that purpose, in the same manner as a *Kāzee* is the substitute of the husband for pronouncing a separation between him and his wife, where he is an eunuch, or impotent. The argument adduced by our doctors on behalf of *Haneefa*, and in reply to the two disciples, is that *collusion* is a matter of uncertainty. And with respect to *sale*, it is not to be particularly appointed for the payment of debts, since it is in the debtor's power to discharge what he owes by various other means, such as borrowing or begging; whence it is not lawful for the *Kāzee* to appoint a sale. It is otherwise in the case of a husband who is an eunuch or impotent, as in that instance separation is the appointed remedy. The debtor, moreover, is not imprisoned with a view to *sale*, (as alleged by the two disciples,) but with a view to the payment of his debts, and to constrain him to adopt some method for the discharge of them.—Besides, if it were lawful for the *Kāzee* to set up the debtor's property to sale, he could not lawfully have recourse to imprisonment, since that would be injurious both to

the debtor and the creditors, as being vexatious to the former, and creating a delay in the discharge of the latter's right, whence the imprisonment would not be sanctioned by the LAW;—whereas it is in fact strictly lawful.

If he be possessed of money, of the same denomination as his debt, the *Kāzee* may make payment with it; or, if the species be different, he may sell it for this purpose.

If the debts owing by the debtor in question consist of *dirms*, and the property possessed by the debtor also consist of *dirms*, the *Kāzee* may in this case discharge the demands upon him without his consent. This is a point in which all our doctors coincide; for as the creditor is here at liberty to take his right without the debtor's consent, it follows that the *Kāzee* is at liberty to assist him in the recovery of it. If, on the contrary, the debt consist of *dirms*, and the property in the debtor's hands be *deenars*, or *vice versa*, the *Kāzee* is in this case empowered to sell such property for payment of the debt. This is according to *Haneefa*, and proceeds upon a favourable construction.—Analogy would suggest that the *Kāzee* is not at liberty to sell the property in this instance, in the same manner as he is not at liberty to sell the debtor's household goods, or other effects. The reason, however, for a more favourable construction of the LAW, in this particular, is that *dirms* and *deenars* are both alike with regard to their constituting price and representing property, as, on the other hand, they differ from each other with regard to appearance: hence, because of their similarity in the one shape, the *Kāzee* is empowered to act with respect to them; and because of their *dis*-similarity in the other shape, the creditor is not at liberty to take them without the debtor's consent. It is otherwise with respect to goods and effects, since those are objects of desire and use, both in appearance and reality, whereas *dirms* and *deenars* are merely a means of obtaining such objects.

Rule in selling off a

IN discharging debts, that part of the debtor's property which consists

consists of money* is first disposed of, then his effects and household furniture; and last of all his houses and lands; for in this mode of adjustment a regard is paid to the ease and convenience of both parties. The debtor's clothes, also, must be sold, excepting only one suit, which is sufficient to answer necessity. Some, however, say that *two* suits must be left with the debtor, one suit being in use whilst the other is washing.

debtor's property.

If a debtor make an acknowledgment whilst under inhibition†, such acknowledgment is not binding upon him until he shall have satisfied his creditors; for as their right was first connected with his property, he is therefore not at liberty to annul it by an acknowledgment in behalf of any other person. It would be otherwise supposing the debtor to *destroy* a person's property; for in that case he would be responsible, and the owner of the property so destroyed would come in upon an equal footing with the other creditors, as the destruction of property is a sensible and perceptible circumstance, and therefore cannot possibly be set aside. If, also, the debtor acquire or obtain property after inhibition, his acknowledgment, as above, takes effect with respect to such property; because the right of the former creditors is not connected with this property, it not existing at the time of inhibition.

Acknowledgments by a debtor are not binding on him until his debts be paid.

A SUBSISTENCE must be paid to the debtor out of his property, (provided he be in poverty,) and also to his wives, infant children, and uterine kindred; because his indispensable wants precede the right of his creditors; and also because, as the maintenance of his wife, &c. is their right, it cannot be annulled by inhibition, whence it is that

A debtor (being poor) gets a subsistence out of his property; and also his wives,

* Arab. *Nakh*, which literally signifies *cash*, but in this place comprehends all sorts of property which come under the denomination of *Māl*, as opposed to *Rakbt* and *Matta* [goods and effects.]

† Proceeding on the idea of the two disciples, that "he may be put under inhibition."

if

children, and
uterine kind-
red.

if he were to marry, his wife comes in upon an equal footing with his other creditors, to the amount of her proper dower.

A debtor, on
pleading po-
verty, is im-
prisoned.

If the debtor be not possessed of any known property, and the creditors require the *Kāzee* to imprison him, he at the same time declaring that "he has nothing," the *Kāzee* must in this case imprison him on account of such debts as he may have incurred by *contracts*, such as a *dower*, or an obligation undertaken by his becoming bail for property.—(Those cases have been already discussed at large in treating of the duties of the *Kāzee*, and therefore a repetition in this place is unnecessary.)

General rules
with respect
to him whilst
in prison.

If the debtor who pleads poverty, as above, fall sick in prison, he is nevertheless continued in durance, provided he have an attendant to wait upon him and administer medicine to him:—but if he have no such attendant, he must in that case be liberated from confinement, lest he perish. If he be an artizan, he must be prevented from following his trade, and must not be suffered to do any work, in order that, from distress, he may be compelled to pay his debts*.—This is approved. If he be possessed of a female slave, under such circumstances as that he may cohabit with her†, he must not be prevented from so doing; since carnal connexion is required to satisfy a man's appetite in the same manner as eating or drinking; and he therefore must not be prevented from indulging himself in this, any more than from eating or drinking. Upon his being liberated from prison‡, the creditors must not be obstructed in enforcing their claims against him,

After libera-
tion, the
creditors are

* This, at first sight, does not appear consistent with the tenderness exhibited towards a debtor in other instances. It is to be recollected, however, that the debtor in question is imprisoned on suspicion of his being possessed of property, which he denies.

† That is, under such circumstances as make her *lawful* to him.

‡ In consequence of the *Kāzee* passing a decree of insolvency in his behalf.

but

but are at liberty to pursue him*. They must not, however, prevent him from transacting business or travelling. The reason of this is that the prophet has said, "*the proprietor of a right has a hand and a tongue,*" meaning, by the *hand*, the power of pursuing, and by the *tongue*, the power of demanding the right. The creditors are also at liberty, in this case, to take the excess† of the debtor's earnings, and divide it among themselves in proportion to their respective claims; for as their right is equal with regard to power, attention must be paid equally to that of each. The two disciples maintain that upon the *Kāzee* declaring the debtor's poverty [insolvency] the creditors must be obstructed, (that is, must be prevented from pursuing the debtor,) unless they adduce evidence to prove his being possessed of property; for as (according to them) the *Kāzee*'s decree of poverty on behalf of the debtor is valid, his inability to discharge his debts is thereby fully established; and this being the case, he is entitled to an indulgence until he may acquire property, and thereby become solvent. According to *Haneefa*, on the contrary, the *Kāzee*'s decree of poverty on behalf of the debtor is not valid; because property comes in the morning and goes in the evening. Besides, as witnesses possess a knowledge of property only with regard to appearance, evidence therefore, although it be proof sufficient to release the debtor from prison, is yet not proof sufficient to annul the right of the creditors, that is, their title to pursue the debtor. With respect to the exception stated in relating the opinion of the two disciples, that "the creditors must not be obstructed unless they adduce evidence to prove the debtor's being possessed of property," it is an argument that evidence of wealth

* Arab. *Molāzimāt*, meaning a continual personal attendance upon or watch over him. This is a customary mode of proceeding, with respect to debtors, among all *Mussulmans*, and is termed, in *Persia* and *Hindustan*, *Nazr-band*, which may be rendered *holding in sight*.

† Meaning any balance which may remain after the maintenance of the debtor and his family.

at liberty to
pursue him;

has a preference over evidence of *poverty*; because the former tends to prove new matter, since the possession or acquisition of wealth is supervenient, whereas indigence is original. With respect, on the other hand, to what has been said, in speaking of the right of pursuing, &c. that creditors "must not prevent the debtor from transacting business, or travelling," it is an argument that the creditor is at liberty to pursue the debtor by accompanying him wherever he goes, but not by fixing him in any particular place; for this would be imprisonment. If, also, the debtor go into his house upon any business, the creditor is not at liberty to enter with him, but must stand at the door until he come forth; because men stand in need of some private and secluded place.

and have an
option, if he
prefer con-
tinuing in
prison.

If a debtor be desirous of continuing in prison, and his creditor be rather desirous of holding him in pursuit, regard is paid to the option of the creditor, as that is the most effectual towards obtaining the desired end, since he, it is to be supposed, will adopt such measures as may distress the debtor, and thus compel him to do justice. If, however, the *Kázee* perceive that the debtor is subjected to any particular injury, (from the creditor in the exercise of the right of pursuing, as, for instance, not permitting him to enter his own house,) in this case he [the *Kázee*] must imprison him [the debtor,] in order to repel such injury.

A male cre-
ditor cannot
pursue his fe-
male debtor.

If the debtor be a woman, and the creditor a man, the creditor must not be suffered to pursue her, since if this were admitted, it would induce the retirement of a man with a strange woman. The creditor, however, is at liberty to depute a confidential *female* to attend the debtor in the exercise of his right.

Case of a pur-
chased article

If a debtor become poor*, having at the same time in his hands

* This, in effect, signifies the same as *failing*, or *becoming bankrupt*.

effects purchased from a particular person, this person, in recovering the price of such effects, is upon an equal footing with the other creditors. *Shafei* maintains that in this case it is the duty of the *Kasae* to lay an inhibition upon the purchaser, provided the seller require him so to do; and then that the seller has it at his option to dissolve the sale; for the purchaser has become incapable of paying the price; and this occasions a right of dissolution, in the same manner as the inability of the seller to deliver the article sold. The ground of this is that sale is a contract of exchange, which requires perfect equality;—in the same manner as a contract of *Sillim*; in other words, if the person who receives the advance, in a contract of *Sillim*, be incapable of delivering the article advanced for, (from its not being procurable, for instance,) the advancer has it at his option either to wait until the other may procure the article, or to dissolve the contract and take back what he had advanced;—and so likewise in the present instance. The argument of our doctors is that poverty occasions an inability to make a specific delivery*. In the case in question, however, the purchaser is not under any obligation to make a specific delivery, but merely to make a delivery of the *price* [of the article purchased,] which is a debt upon him. Hence the seller is not endowed with a right of dissolution in consequence of the purchaser's inability to make such specific delivery.

being in the
debtor's
hands upon
his failure.

OBJECTION.—If debt in general be obligatory upon the purchaser, and not a *particular substance*, it would follow that the purchaser is not discharged of the demand by his giving money, and the seller taking possession of it, since *substance* is different from *debt*.

REPLY.—By the seller taking possession of the particular money,

* Arab. *Ain*, meaning (in this place) the particular sum of money owing to the seller. It is proper here to observe that the Arabian lawyers make an essential distinction between *debt* and *substance*, the former being considered as merely ideal, until it be realized.

a substitution is established between this substance and the debt owing by the purchaser; and as this is the original object in paying debts, regard must therefore be had to it, unless that be impossible, which however is not the case in the example here considered.—It is otherwise in a contract of *Sillim*; for there no regard can be paid to substitution, as it cannot there be admitted;—whence it is that, in contracts of *Sillim*, the substance, or particular sum taken possession of, is accounted to be, in effect, the thing for which the advance is made, and which remains a debt upon the person who receives such sum.

H E D A Y A.

B O O K XXXVI.

Of MAZOONS, or LICENCED SLAVES*.

MAZOON is the passive participle from *Izn*.—*Izn*, in its primitive sense, means certification.—In the language of the LAW it signifies a removal of the inhibition to which a slave is subjected by his bondage, and also (according to our doctors) a remission of the master's right;—and, upon this taking place, the licenced [*Mazoon*]

Definition of
the term;
and introduc-
tory remarks.

* They are in some parts of the work termed *privileged slaves*.—The expressions are strictly synonymous, the term *Mazoon* applying to either.—In fact, *Mazoon* literally signifies *licenced*, and therefore applies to any licenced person whatever:—but it is also the technical term for a *licenced slave*, and where it occurs by itself is always to be taken in that sense.

slave

slave is empowered to act for himself, in virtue of his own competency; because a slave, even during his bondage, is endowed with a natural capacity for acting, as possessing the gift of speech and a discriminating understanding.—Besides, he was inhibited, and prevented from acting, merely on account of his master's right; for as his acts were known and acknowledged by the LAW, only inasmuch as they were the means of subjecting to debt his person or acquisitions, which are his master's property, the master's assent to what he did was therefore requisite, in order that his rights might not be rendered null without his will.—As, however, the transactions of a *licenced* slave are carried on by him independantly, in virtue of his own inherent competency, and not by delegation from his master, hence any obligations he may incur are not exacted from the master.—As, also, the licence is a remission of the master's right, it therefore cannot be made temporary or restricted; and hence if a person grant a licence to his slave for *one day*, or *one month*, such slave becomes licenced perpetually, or until the master lay an inhibition upon him, as the master's remission of his right cannot be restricted to any particular time.—It is proper to observe that, in the same manner as *Izn*, or licence, is established by an express declaration, so also is it established by inference; as where, for instance, a person sees his slave transacting purchase or sale, and knowing and perceiving him to be thus employed, he notwithstanding remains silent,—in which case the slave becomes *Mazoon*, or licenced, according to our doctors; (contrary to the opinions of *Ziffer* and *Shafei*;) and it makes no difference, in this case, whether the slave be employed in selling the property of his master, or that of any other person, with or without his consent,—or whether the sale be valid or invalid,—for every person who sees the slave thus employed will, from appearances, conclude that he is licenced with regard to purchase and sale, since otherwise his master would certainly prevent him;—consequently, people will transact business with him without hesitation; and, if he were not licenced,

cenced, they would sustain an injury on his becoming indebted to them*.

If a person give his slave an unlimited licence to trade, by saying to him "I permit you to trade," without restricting the permission to any particular species of traffic, in this case his transactions are lawful and valid in all descriptions of commerce, the term trade [*tajârî*] comprehending all sorts of mercantile concerns.—It is therefore lawful for him to purchase or sell whatever he pleases of goods or effects, as this is the original mode of conducting trade. He may also purchase or sell at any inconsiderable disadvantage, as this cannot always be guarded against. In the same manner also, sale by him at a great disadvantage is valid, according to *Haneefa*. The two disciples hold that he cannot lawfully sell any thing to a great disadvantage, because sale at a great loss is in fact the same as a gratuity,—whence it is that if a dying person sell any thing at a very considerable disadvantage, the loss can affect only one third of his property. The licence, therefore, granted to a slave to purchase or sell does not include purchase or sale at a very disproportionate and manifest loss, since he is not at liberty to perform gratuitous acts. The argument of *Haneefa* is, that sale at any disadvantage, whether great or inconsiderable, is an act of commerce; and the slave in question, moreover, acts in virtue of his own inherent competency, in the same manner as a freeman.—The same difference of opinion also obtains concerning a licenced infant.

An unlimited licence of trade extends to every species of commerce.

If a licenced slave transact a *Mohabât* sale upon his deathbed, it extends to and affects the whole of his property, where there

Case of *Mohabât* sale

* Because in this case they would have no means of recovering their right;—for if the slave be supposed to act without his master's concurrence, the master cannot be responsible for such debts as may be incurred by him;—or if, on the other hand, he be not supposed licenced, his person or property cannot be attached.

by a licenced
slave.

are no debts against him;—or if he be in debt, it extends to the whole of what remains after discharging his debts;—because its effect would be restricted to one third of his property only on account of his heirs; but a licenced slave has no heirs.—If his debts involve the whole of his property in his possession, the purchaser must in this case be desired either to make good the whole consideration of *Mohabât*, or to dissolve the sale,—in the same manner as holds in the case of a *Mohabât* sale transacted by a dying bankrupt.

He may en-
gage in a
Sillim con-
tract,

It is lawful for a licenced slave to engage in a *Sillim* contract, and to give his assent thereto, as this is a commercial transaction.—It is also lawful for him to constitute an agent for purchase or sale, as he has sometimes occasion for such.

or give and
accept
pledges,
or hire land,
&c.

It is lawful for a licenced slave to give and to accept pledges, as this is a dependant concern of traffic, being a mode of paying and exacting payment.—It is moreover lawful for him to hire land, houses, or servants, all these being transactions of traffic. He may likewise

or purchase
grain for cul-
tivation,

take land from a person under a *Mozâreeat*, or compact of cultivation, as this is attended with advantage;—and he may also purchase grain, and sow it in his own grounds, as by this means it yields a profit. A

or engage in
a commercial
partnership,
or a contract
of *Mozâribat*,

licenced slave is also at liberty to enter into a *Shirkat Ainân*, or partnership in traffic, with any person, or to entrust his property to any one in the manner of *Mozâribat*, or to take charge of another's property with a view to manage it by *Mozâribat*,—all such acts being customary

or let himself
to hire.

amongst merchants.—It is also lawful for him to let himself to hire, according to our doctors. *Ziffer* and *Shafëi* dissent from this opinion; for they argue that as he cannot sell *himself*, so neither can he sell his *services*, service being a dependant of the person; and where he lets himself to hire, it is a sale of his services. The argument of our doctors is, that as the person of the slave in question constitutes his capital, he is therefore empowered to act with it, unless his so doing should involve a destruction of his licence,—as where, for instance, he

sells

sells his person, or delivers it up in pledge;—for if he were to sell himself, and the sale be valid, he thereupon becomes the property of the purchaser, and the licence granted him by his former master becomes null, and he remains inhibited until he receive a new licence from his second master, the purchaser; and in the same manner, if he were to pawn himself, he would be prevented from acting in consequence of being detained in the pawnee's hands, whence the advantage proposed by the master in granting him a licence would be defeated. By *hiring* himself, on the contrary, he does not subject himself to inhibition, and the end proposed by the master (namely, advantage) is also obtained:—whence he is empowered so to do.

IF a person licence his slave with respect only to *one* mode of traffic, (such as *clothiery*, for instance,) the slave becomes licenced with respect to all sorts of trade. *Ziffer* and *Shafei* maintain that he is licenced only with respect to that particular branch of trade:—and the same difference of opinion obtains, supposing the master expressly to inhibit his slave from exercising any other business. The argument of *Ziffer* and *Shafei* is, that the licence granted by the master is, in fact, a delegation and appointment of agency proceeding from him; because a licenced or privileged slave derives his power of acting from his master, in whom also is established the effect of his acts (namely, right of property,) and not in the slave, (whence it is that the master may lay him under inhibition at pleasure;) and that therefore the licence of trading, granted to the slave, is restricted to the particular branch mentioned by the master; in the same manner as holds with respect to a *Mozarib*, or manager under a *Mozaribat* contract.—The argument of our doctors is, that a licence of trade, granted to a slave, is a remission of his master's right, and a removal of inhibition from the slave, as has been already explained. The master, therefore, in the present instance, in granting the licence, removes all restraint from the slave; and as, on this happening, his natural power of action is rendered apparent, and he becomes entitled to act in virtue of

If his licence express only one mode of trade, he is licenced with respect to every description of it.

his own inherent competency, it follows that his power of action is not restricted to any particular branch of trade.—It is otherwise with an agent; for as he acts with the property of another, his power of acting is consequently established on behalf of the owner of such property.—The effect, moreover, of the slave's transactions (namely, right of property) is established in the slave; whence it is that he is entitled to expend what he acquires in the discharge of his debts, and in maintenance, the excess going to his master, who becomes proprietor thereof by succession.

Authority to perform any particular matter is not a general licence.

If a person authorize his slave with respect to any particular matter, such as to purchase cloth for apparel, or victuals for his family, the slave does not hereby become licenced, since a licence of this nature is merely an *employment*.—The ground of this is that if the slave, by being so authorized, were to become licenced, it would preclude the master from employing him.—It is otherwise where a person says to his slave, “pay me so much *per* month out of your acquisitions,” (or “pay me one thousand *dirms*,”)—“and you are free;”—for in this case the slave becomes licenced; as the master here requires property from him, which he cannot procure but by engaging in trade. It is also otherwise where a master directs his slave to exercise any particular art, such as *dying* or *fulling*; for here likewise the slave becomes licenced; because the master's direction, in this instance, is a licence to him to purchase the materials requisite for dying or fulling cloth; and as this is a *licence to purchase*, he accordingly becomes licenced with respect to every branch and description thereof.

A licenced slave's acknowledgment of debt, usurpation, or trust, is valid;

A LICENCED slave's acknowledgment of debt or usurpation is valid, and so likewise his acknowledgment of a trust; because acknowledgment is incidental to traffic; and hence if his acknowledgment were not valid, people would always decline dealing with him, and would avoid purchasing from or selling to him.—This rule obtains whether the slave be involved in debt or otherwise.—In short, his acknowledgment

knowledge is valid in either case, provided it be made during health: but when it is made during sickness, his debts contracted during health must be discharged prior to those acknowledged during sickness, in the same manner as obtains concerning a freed-man.—It is otherwise, however, with respect to his acknowledgment of a matter not rendered obligatory upon him in course of trade; for such acknowledgment is invalid, since in regard to it he is inhibited*.

but not of a matter which has not occurred in course of trade.

It is unlawful for a licenced slave to marry†, this not being a commercial transaction: neither is he at liberty to contract his male or female slave in marriage.—*Abou Yoosaf* maintains that he is at liberty to contract his female slave in marriage; for as he thereby obtains property, namely, her dower, his so contracting her consequently resembles his letting her out to hire.—The argument of *Haneefa* and *Mohammed* is that licence comprehends merely commercial transactions; and the contracting of a female slave in marriage is not a matter of commerce; whence it is that a licenced slave is not empowered to contract his male slave in marriage.—The same difference of opinion obtains concerning a licenced infant, a *Mokâribat* manager, a partner in *Shirkat Ainân*, and a father or executor;—that is to say, these are not at liberty to contract a male slave in marriage, according to all our doctors; but concerning their right to contract a female slave in marriage there is a difference of opinion between *Abou Yoosaf* and the other two.

He cannot marry; nor contract his slave in marriage;

A LICENCED slave is not at liberty to constitute his slave a *Mokâtib*, because this is not a commercial transaction; for commerce consists in an exchange of property for property; and this characteristic does not exist in a contract of *Kitâbat*, as the consideration of *Kitâbat* (that is,

nor render him a *Mokâtib*;

* Arab. *Mahjoor*. This word must here be taken as a substantive technical term, meaning an inhibited slave.

† Without the consent of his master or owner.

the ransom) is opposed to the removal of restraint, which is not property.—A licenced slave, therefore, constituting his slave a *Mokâtib*, does an act which is unlawful;—unless, however, his master assent, and he himself be not involved in debt,—in which case the contract of *Kitâbat* is lawful and valid, as the master has become proprietor of such *Mokâtib* slave, the licenced slave being merely his substitute in constituting that slave *Mokâtib*: and in this case the rights of the contract revert to the master, as an agent or substitute, in executing a contract of *Kitâbat*, is merely a negotiator, in the manner of a messenger.

nor emanc-
pate him for
a compensa-
tion;

A LICENCED slave is not at the liberty to emancipate his slave for a consideration; for as he is not empowered with respect to a contract of *Kitâbat*, it follows, *a fortiori*, that he is not empowered with respect to manumission in return for a compensation.

nor lend or
bestow any
thing; nor
give alms.

A LICENCED slave is not at liberty to *lend* to any person; neither is he at all at liberty to make a gift, whether on condition of receiving a return or otherwise; and in the same manner, also, he is not competent to bestowing alms;—for as all these are gratuitous acts, (gift on condition of a return being also gratuitous in the beginning,) they are not included in a licence to trade.—It is, however, lawful for him to bestow a small quantity of food upon a person, or to give an entertainment to a person who entertains him in return, since in the course of trade this is necessary to conciliate the minds of merchants.—It is otherwise with an unlicenced slave; for such an one is not at liberty to make the smallest present, or to give an entertainment, because this is requisite only in the course of trade, and he is not licenced to trade, so as to be under any necessity of so doing.—It is recorded, from *Aboo Yoosaf*, that where a master gives his inhibited slave provisions for one day, he may without hesitation invite friends to partake of the same: but if he give him a month's provisions at one time, it is not in such case lawful for him to invite his friends to partake of the same, because

He may give
food, or an
entertain-
ment;

if

if those friends were to consume the meat before the end of the month, it would be injurious to the master.—(Lawyers here observe that if a wife bestow in alms, from the house of her husband, any trifling matter, such as a single loaf, it is immaterial, since inhibition does not commonly descend to so small an article.)

It is lawful for a licenced slave to make an abatement in the price of merchandize, on account of a defect, to the same degree as is made by merchants; because this is a branch and a contingent of traffic, customary among traders; and it is frequently more advantageous to make an abatement than it would be to take back the defective article. It is otherwise where an abatement is made without any defect in the article; for this is unlawful, as being a purely gratuitous act after the completion of the contract, and not a branch or contingent circumstance of traffic.—*Mohabât* is not of this nature in the beginning; for that is sometimes necessary, in order to conciliate the minds of purchasers.

or make an abatement in the price of merchandize in consideration of a defect;

It is lawful for a licenced slave to indulge his debtors with a delay; and also to fix a time for the payment of his own debts; this being customary amongst merchants.

or grant a term of credit.

DEBT owing by a licenced slave attaches to his person,—that is to say, he may be sold for such debt,—unless his master satisfy the creditor by discharging it.—*Ziffer* and *Shafei* maintain that he cannot be sold.—His *earnings*, however, may be attached according to all, for concerning this there is no difference of opinion.—The reason alleged by *Ziffer* and *Shafei*, why the slave should not be sold, is that the end proposed by the master in licencing his slave is the acquisition of *new* property, not the destruction of the *old*, which end may be obtained where the debts contracted by the slave attach to his *acquisitions*, but not where they attach to his *person*;—whence it is that if, after paying debts, any thing remain, such residue goes to the master.—It is other-

He may be sold for the payment of debts

wife

wife with respect to debt incurred by the slave for a destruction of property; for that attaches to his person, and he may be sold on account of it; as such destruction is a species of offence; and the destruction of a slave's person, in consequence of an offence, does not depend upon his master's licence [for the perpetration of the offence.]—The argument of our doctors, in support of the contrary opinion, is that the obligation of a debt incurred by a licenced slave evidently rests upon his master also; for such debt is contracted by the slave in consequence of trade, and in that he has engaged with his master's concurrence.—The obligation of his debts, therefore, being evident in regard to the master, they consequently attach to the slave's person, for the satisfaction of his [the slave's] creditors; in the same manner as a debt of responsibility for compensation attaches to the person of a slave in case of his destroying the property of any one,—the reason of which is, that people may be protected from injury, and the same reason obtains in the case here considered.—Debt, therefore, contracted by the slave in question, attaches to his person on this ground, that it is occasioned by trade, and such trade is engaged in and carried on with the master's concurrence.—Besides, the circumstance of the slave's person being liable for debts contracted by him in the course of trade is a motive to people to transact business with him; and for this reason it may be concluded that the master designed it [the slave's person] should be so liable:—neither is this injurious to the master, as the injury to him is remedied or prevented by the article sold being included in his right of property*.—As, moreover, the debt's attaching to the slave's *acquisitions* is no ways repugnant to its attaching to his person, it therefore attaches to both;—the payment of them, however, being first made out of his acquisitions, and if those prove in-

* The expression in this place is somewhat obscure.—It most probably means that upon the slave being sold for the discharge of his debts, as the sale is executed ostensibly on behalf of the master, he is consequently entitled to any excess which may remain from the price after the debts have been paid.

sufficient,

sufficient, then by means of his person.—It is to be observed that the debts here treated of mean those occasioned by actual trade, such as purchase and sale, or by some transaction which is trade in effect, such as hiring, or letting to hire, or responsibility, or a trust or deposit where they are denied by him,—or by a fine of trespass incurred from his having copulated with a female slave whom he had purchased, but who afterwards proves to be the property of another; (for as the obligation of such fine has been induced by the *purchase* of the female slave, it is consequently referred thereto.)

contracted in
the course of
trade;

UPON a licenced slave being sold for the discharge of his debts, his price is divided among the creditors in proportion to their respective claims; because their right is connected with the slave's person; and the connexion of their right with his person is the same as with the estate of a defunct.—If, therefore, the price produced by the sale prove insufficient for the discharge of the debts, the residue is claimable from the slave upon his attaining freedom; because the debts have been established upon his credit, and his person has proved unequal to the payment of them:—but he cannot be sold a second time for the payment of the remaining debt; for if he were to be sold again, after having been already purchased by some person, this person would sustain an injury; and if, moreover, it were known that he is liable to be sold a second time, no person would bid for him, and consequently the first sale would be altogether prevented.—It is to be observed that the debts contracted by the slave in question attach to all his gains and earnings, whether acquired *after* they were incurred or *before*; and also to any thing obtained by him in the manner of a gift; because his master does not become proprietor of his acquisitions until after they are free of all demands, which is not the case until his debts be paid.—They do not, however, attach to any thing which the master may have taken out of his hands before the debts were incurred, that being purely the property of the master, since the condition of its so being had existence at the time of his taking it.—The master

and his price
is divided
among his
creditors in
proportion to
their claims;
he remaining
responsible for
the deficiency
after he shall
have become
free.

is also entitled to take from the slave his proportionate produce*, which he has imposed upon him monthly (for instance) *after* the debts were incurred, as well as *before*; for if he were prevented from so doing, he would lay an inhibition upon the slave, and consequently no earnings could be acquired by him. But if he should have taken from the slave, after the debts were incurred, any thing more than his *proportionate* produce, he must give the excess to the creditors, as their right has a preference: besides, the master's right to take the *proportionate* degree of produce is because of the necessity above stated, which does not exist with respect to any excess.

An inhibition
laid upon him
by his master
does not
operate until
it be publicly
known,

If a master impose inhibition upon his licenced slave, still the slave does not become inhibited until the same be known to all merchants and *Bazâr* dealers; for if he were to become inhibited before, *Bazâr* dealers might sustain an injury; because they might sell articles to an inhibited slave, under a supposition of his being licenced; and as their right could not attach to the slave's person, from the circumstance of his being inhibited, the enforcement of it must consequently be delayed until he obtain his freedom.—It is to be observed that it is requisite that a *majority* of the merchants and dealers in the *Bazârs* be apprized of the inhibition.—If, therefore, a master impose inhibition upon his licenced slave in the *Bazâr*, at a time when there are only one or two persons present in that place, the slave does not become inhibited; whence if he [the slave] afterwards sell to or purchase of the *Bazâr* dealers, it is valid, although such purchase or sale be transacted with persons aware of the inhibition.—If, on the other hand, the master impose the inhibition in his own house, in presence of a principal number of the *Bazâr* dealers, the slave is inhibited accordingly.—In

* *Ghalla Misala*, meaning (in this place) the common produce from a slave's labour, in proportion to sex, age, &c. for which (whatever description the slave be under) the master has a claim, exclusive of any other advantage, daily, weekly, monthly, or annually, as he may have appointed.

short,

short, regard is paid to the notoriety and publicity of the inhibition, such publicity standing as the substitute of an appearance to all, in the same manner as the publicity of the mission of the prophets amounts to the actual appearance of the same to all mankind.

If a master impose inhibition upon his licenced slave, still the slave continues licenced until such time as he be informed of the inhibition, he in this particular resembling an agent, who, if dismissed by his constituent, does not stand as dismissed until he be made acquainted with that circumstance.—The ground of this is that if a licenced slave were liable to become inhibited without his knowledge, he would sustain an injury, in this way, that any debts contracted by him after the inhibition, would fall upon his own property in the event of his becoming free.—With respect to the necessity of the inhibition being public and notorious, it obtains only where the licence has also been of a public nature;—for where the licence has not been public, none being acquainted with it but the slave himself, and his master afterwards imposing inhibition upon him, he in this case becomes inhibited provided he be apprized, this not being injurious to any.

and he himself be made acquainted with it.

If the master of a licenced slave die, or become insane, or apostatize from the faith and be united to a hostile country, such licenced slave thereupon becomes inhibited; because granting a licence to a slave is not an absolute or binding act; (whence it is that a master may at any time revoke a licence granted by him;) and as it is a rule that the *continuance* or *duration* of any act not of a binding nature is subject to the same law with its *commencement*, it is therefore indispensably requisite that the master possess competency to grant a licence during the *continuance* in the same manner as at the *commencement* of such licence:—but this competency is terminated by death or madness; and so likewise by expatriation, as that is death in effect,—whence it is that the property of an expatriated apostate is divided among his heirs.

He becomes virtually inhibited on the death, apostacy, or insanity of his master;

or on himself
absconding.

If a licenced slave abscond, he becomes inhibited.—*Shafci* maintains that he still continues licenced; for as his absconding would not be repugnant to his receiving the licence in the beginning, so likewise it is not repugnant to it in its continuance;—in the same manner as in usurpation; that is to say, if a person usurp the licenced slave of another, the licence still continues in force with respect to such slave; and so also in the present instance.—The argument of our doctors is that the absconding of a licenced slave operates as an inhibition upon him by inference; because his master assented to the licence only under the idea of being able to pay such debts as the slave might incur by means of his earnings; but upon his absconding this ability no longer remains.—It is otherwise in a case of usurpation; for the master's licence in regard to the slave still continues after his being usurped, since the master may easily recover him out of the hands of the usurper, by an appeal to the magistrate.

A licenced
female slave
becomes in-
hibited by
bearing a
child to her
master.

If a licenced female slave bear a child to her master, this circumstance operates as an inhibition with respect to her.—*Ziffer* is of a different opinion; for he conceives an analogy between the *continuance* of licence and its *commencement*,—in other words, if a master grant his *Am-Walid* a licence to trade, it is lawful from the first, and so in the same manner the licence granted to a female slave continues in force after her bearing a child.—Our doctors, on the other hand, argue that it is most probable that, after her bearing a child to him, the master may be unwilling that his slave should mix with other people for the purpose of carrying on commercial transactions, and will not permit her to go forth from his house, whence an inhibition may be inferred with respect to her by custom.—It is to be observed that in case of a licenced female slave bearing a child to her master, he becomes responsible to her creditors for her value, as having (with respect to them) destroyed the subject with which their right was connected, since in consequence of his creating her an *Am-Walid* she becomes

becomes incapable of being sold, whereas otherwise she might be sold for the discharge of their demands.

If a licenced female slave be involved in debt to an amount beyond her real value, and her master afterwards create her a *Modabbirâ*, she still continues licenced as before, because here is nothing which would argue her becoming inhibited, since it is not customary for a man to prevent his *Modabbirâ* from mixing with others for the purpose of transacting purchase and sale:—neither is there any contradiction between the effect of licence and *Tadbeer*, since each induces a species of freedom, as in consequence of licence a slave becomes empowered to act, and in consequence of *Tadbeer* he acquires an ultimate claim to freedom, and between those there is nothing irreconcilable. It is to be observed, however, that in consequence of constituting his licenced slave a *Modabbirâ*, the master becomes responsible to her creditors for her value, for the reason already assigned in treating of an *Am-Walid*.

If indebted, still she is not inhibited by being made a *Modabbirâ*.

WHERE a master imposes inhibition upon his licenced slave, the slave's acknowledgments are valid to the amount of the property in his hands,—in other words, if he were to acknowledge that all the property in his hands is a *deposit* belonging to a particular person, or that he has *usurped* it from a certain person, or that he is *indebted* to that amount, satisfaction must be made from that property. This is according to *Haneefa*. The two disciples maintain that his acknowledgments made after inhibition are invalid; for if his acknowledgment be rendered valid by a licence, that has been revoked by the subsequent inhibition, or if it be rendered valid by his *possession* of the property, that also has become null in consequence of the inhibition, no regard being paid to the seizure of an *inhibited* person.—Hence the case is the same as if the master were to take the slave's acquisitions out of his hands before he makes any acknowledgment, or, as if the inhibition were occasioned by the master selling him to some other person,—whence it is that an acknowledgment made by him, with respect to

The acknowledgments of a licenced slave, laid under inhibition, are valid to the amount of the property in his hands.

his person, after inhibition, is not valid.—The argument of *Haneefa* is that the acknowledgment of the slave with respect to the property is rendered valid by his *possession* of it, not by his *licence*, (whence the invalidity of his acknowledgment with respect to what his master has taken out of his hands.)—Now in the case in question the slave still continues *actually* possessed of the property;—and so likewise *virtually*; because, in order to his possession being annulled by inhibition, it is requisite that the property be free of all wants or necessities on the part of the slave; but from his acknowledgment a continuance of his necessity may be inferred with regard to it.—It is otherwise with respect to any thing which the master may have taken out of his hands before acknowledgment; for as the master's possession is established with regard to that both *actually* and *virtually*, such possession cannot be annulled by the slave's acknowledgment; and in the same manner his person being the master's actual property, his [the master's] right therein cannot be annulled by the slave's acknowledgment without his concurrence. In short, in the example here considered the slave's possession of the property is fully established; and hence his acknowledgments affecting it are valid. It would be otherwise if a master should *sell* his licenced slave; for there the purchaser becomes his proprietor, whence the property in him undergoes a change; and as a change in the right of property occasions a change in the property itself*, (as has been explained in its proper place,) the licence of the former master with respect to the slave therefore terminates; consequently he becomes inhibited, and his acknowledgment with respect to the property in his hands is invalid;—whence it is that a slave so circumstanced cannot appear as a litigant concerning a contract to which he had been a party before he was sold.

If his person
and property
be involved

If a licenced slave be indebted to a degree which involves both his property and his person, in this case his master is not proprietor of any

* Namely the slave:—the phrase is here rather ambiguous, as the term *Mamlook* (which the translator has rendered, in its literal sense, *property*) is frequently used to signify a *slave*.

thing

thing in his hands; insomuch that if he were to pronounce a manumission upon a slave, being part of the licenced slave's acquisitions, yet the slave is not free, according to *Haneefa*. The two disciples maintain that the master is proprietor of what is in the hands of the licenced slave; and that the slave who is part of the licenced slave's acquisitions is therefore free; because the occasion of the master's right over the acquisitions of his licenced slave (namely, his right of property with respect to such slave's person) still exists, since he is still proprietor of his person;—whence it is that a master is empowered to emancipate his licenced slave, or to have carnal connexion with his licenced *female* slave; from the legality of which acts it may be inferred that a master's right in his licenced slave is complete and perfect.

in debt, his
master has no
power over
the property.

OBJECTION.—From what is here advanced it would appear that the heir of a person deceased becomes proprietor of his estate, although it be involved in debt, since the occasion of his right of property (namely, relationship) is fully established;—whereas, in point of fact, the heir does not become proprietor of the estate in such a case.

REPLY.—The heir becoming proprietor of the estate of a person deceased is intended for the advantage of the latter, in order that his effects may not be dissipated in the world, but go to his kindred.—Where, on the other hand, his estate is involved in debt, it is for his advantage that his heirs should *not* become proprietors of it, in order that he may be freed from debt, and his future state be well; for if he remain subject to debt, it might be injurious to him in his future state.

—With respect, on the contrary, to the master's right in any thing which may be in his slave's possession, it is not established with a view to the advantage of the slave, but on account of the right of his master. The argument of *Haneefa* is that the master's right of property with respect to what may be in his licenced slave's hands is established merely by succession from the slave, and provided it be free from all incumbrance or necessity on his part,—in the same manner that an heir's

heir's right of property is established in the estate of his ancestor, as was before explained: but where the effects in the slave's hands are involved in debt, they are not free from incumbrance on his part, and hence the master is not proprietor thereof by succession. — Now having thus explained the nature of the establishment or *non*-establishment of the master's right of property with respect to the effects in question, the emancipation or *non*-emancipation of the slave, in consequence of the master's manumission, follows as a branch: — that is to say, with those who hold that the master's right of property therein is not established, the slave does not stand emancipated in consequence of the master's manumission; — and, on the contrary, with those who conceive it to be established, the slave is free in consequence of such manumission. — It is to be observed that as, according to the two disciples, the slave is rendered free by the master's manumission, it follows (agreeably to this principle) that the master is responsible to the creditors of the licenced slave for the value of such manumitted slave, their right having been connected with that slave's person.

If his property be not entirely involved, his master may emancipate a slave of his acquisition.

If the property of the licenced slave above mentioned be not *entirely* involved in debt, and the master pronounce a manumission upon the slave of such licenced slave, it is valid and effectual, according to all our doctors. Its validity according to the two disciples is evident; and so likewise according to *Haneefa*; for as the property of a licenced slave can never be *completely* free from debt, if a small debt, from its prohibiting the establishment of the master's right of property, were to prevent the validity of a manumission pronounced by him, the master would always be precluded from any use of his licenced slave's property, and consequently the end proposed by him in granting the licence would be defeated; — whence it is that the circumstance of a small debt attaching to the estate of a deceased person does not prevent his heirs from inheriting, whereas if the estate were *completely* involved in debt they would be prevented.

IF the licenced slave here treated of sell any thing to his master for an adequate price, it is lawful; because, where a licenced slave is involved in debt, his master is, with respect to his acquisitions, in the same predicament as any other person. If, on the contrary, he sell any thing to his master at a price short of the value, it is unlawful, as he is in such case liable to suspicion with regard to his master. It is otherwise where he sells any thing at an under value to a stranger; for (according to *Haneefa*) this is lawful, as he is not liable to suspicion with regard to a stranger. It is also otherwise where a dying person sells any thing to one of his heirs for an adequate price; because this (according to *Haneefa*) is unlawful, as the right of the other heirs is connected with the *substance* of that thing, (whence any one of the heirs is at liberty to redeem it by paying the value,)—whereas the right of the creditors of a licenced slave is connected with the *property* of the slave's effects, not with the *substance* of them, (whence it is that the slave's master is at liberty to redeem the effects, by discharging the creditors' demands out of his own substance.)—Besides, by the slave selling the article for an adequate price, the right of the creditors, which is connected merely with the *property* of it, is not annulled; and consequently the sale is valid;—whence there is an evident difference between the case of the dying person and that of the licenced slave. The two disciples allege that if the licenced slave in question sell any thing to his master for a price even *short* of the value, the sale is lawful,—but in this way, that the master has it at his option either to pay the difference of value, or to break off the contract. It is to be observed that, according to the tenets of both parties, (that is, of *Haneefa* and the two disciples,) a sale at an under value is in this instance the same, whether the loss upon it be great or small. The reason, also, of the sale being rendered lawful in the way above described, is that it is prohibited merely for the sake of avoiding any injury to the creditors; but where it is made lawful in the manner there suggested, they sustain no injury, and it is consequently lawful for the reason assigned. It is otherwise where the

licenced

Further rules
with respect
to a licenced
slave involv-
ed in debt.

licenced slave in question sells any thing at a small under value to a stranger; for such sale is lawful, without the stranger paying the difference of price;—but the master is directed to pay the difference;—because the degree or proportion in which the article has been undervalued admits of two constructions; for first, it may be considered purely as a *gift*, no part of the price being opposed to it; and, secondly, it may be considered purely as a *sale*, as some appraisers will value the whole article according to the price for which it was sold:—hence it is considered as a gift, in case of the master being the purchaser, since in that case the slave is liable to suspicion; and, on the other hand, it is not considered as a gift in case of a stranger being the purchaser, since in such a case no suspicion can be entertained. It is also otherwise where the licenced slave in question sells any thing to a stranger at a *great* undervalue; for in this case the sale is unlawful, according to the two disciples;—whereas, if made to the master, it would be lawful, and he would be desired to make up the difference by paying the whole value; for (according to the two disciples) it is not lawful for a licenced slave to sell any thing at an undervalue without his master's concurrence; and where he thus sells a thing to a stranger, this concurrence does not exist; but it exists, by inference, where he thus sells a thing to his master, whence the sale is lawful in this instance;—the master, however, must be desired to make up the difference by paying the whole value of the article, because of the right of the creditors. The distinctions here explained are agreeably to the tenets of the two disciples.

If the master sell any thing to his licenced slave for an adequate price, or for less than the value, it is lawful, because the master is as a stranger with respect to the acquisitions of his licenced slave when involved in debt, for the reason before assigned, (nor is there any room for suspicion in this instance;)—and also, because the sale in question is attended with two advantages,—one, that an advantage is derived to the slave's acquisitions, in the article purchased from his master,

master;—and another, that the master is enabled to take the price out of the slave's acquisitions after having been disabled to take any thing from them;—and the sale, as being thus attended with a twofold advantage, is accordingly valid, since the validity of a sale is a consequence of its being advantageous.—If, therefore, the master deliver the article sold before he has received the price of it, his right to take the price ceases; for he only had a right to detain the article sold in order to secure the price; and, upon his delivering the article, that right ceases; and if, afterwards, the price still remain unpaid, it follows that such price is a debt upon the slave's person; but a master has no claim to a debt due from his slave. It is otherwise, however, where the price consists of substance, that is, of particular goods or effects, for in that case the price is not annulled or remitted upon the delivery of the article sold, since such goods or effects are specific, and the master's right, connected with them, may lawfully continue in force. If, also, the master detain the article sold, and refuse to deliver it until he receive the price, it is lawful; because a seller has a right to detain the article sold;—whence it is that the right of a seller has a preference over that of any other creditors. A master, moreover, has a legal claim to a debt due from his slave, where it relates to substance;—whence it is that a master has a claim upon his *Mokâtib* for his ransom, which is a debt, because it is a debt relating to his person. What is said above, that “if the master deliver the article sold before he has received the price of it, his right to take the price ceases,” is according to the *Zâbir Rawâyet*. *Aboo Yoosaf* alleges that this is where the article sold is not extant in the slave's possession; for if it be extant in his hands, the master is entitled to take it back and detain it until he receive the price.

If a master sell any thing to his indebted licenced slave at an over-value, in this case he must be directed either to return what he may have received over and above the real value of the article, or to undo the sale,—in the same manner as before explained in the case of the

licenced slave being the seller, and his master the purchaser; because the right of the creditors is connected with such excess.

His master may emancipate him, remaining responsible to the creditors for his value:

IF a master emancipate his licenced slave, he [the slave] being involved in debt, such manumission is valid; because the master is proprietor of the slave, and his right of property in him still continues after licence. The master, however, is responsible to the creditors for the value of the slave, as having destroyed their right, which was connected with the slave in this manner, that they might have sold him, and paid themselves out of his price. The creditors also have a claim upon the slave, after he becomes free, for the proportion in which his value falls short of his debts; because the debts rest upon the faith of his person, and the master is not liable to more than a compensation for what he has destroyed. If, however, the slave's debts be short of his value, in this case the master, in consequence of emancipating him, is responsible to the creditors only for the amount of the debts, that alone being their right. It is otherwise where a master emancipates his *Modabbir* or *Am-Walid*, being licenced and indebted, for in this case he does not owe any thing whatever to the creditors, since their right does not attach to the *person* of the *Modabbir* or *Am-Walid* so far as that they might sell them to obtain payment of their demands, and hence the master has not, by emancipating those slaves, injured the right of their creditors.

and he may also sell him; but the creditors are entitled to the price, or may demand a compensation either from the *seller* or the *purchaser*.

IF a master sell his licenced slave, who is indebted to a degree that involves his person, and the purchaser take possession of the slave, and send him away or hide him, in this case the creditors have it in their option to take a compensation either from the master who sold the slave, or from the purchaser;—because their right is connected with the slave's person; (whence their title to sell him unless the master pay their demands;) but the master, in selling the slave, and delivering him to the purchaser, effectually destroys their right, as attached to his person; and, on the other hand, the purchaser also destroys their

their right by sending the slave away or concealing him. Hence they are entitled to take the compensation from either party. They may also lawfully accede to the sale, and take the price, as that is their right, and this ultimate permission stands in the place of a prior permission;—in the same manner as where a pawnholder sells the article pledged, and the pawnholder then accedes to the sale; in which case this ultimate consent stands in the place of a prior consent. It is to be observed that if, in the case here considered, the creditors take the value from the master who sold the slave, and the purchaser afterwards return him upon a discovery of defect, the right of the creditors then attaches to the slave's person, and the master is entitled to recover from them the value of the slave, which he had paid to them in compensation; because the sole reason for his being subject to compensation was his selling the slave and delivering him to the purchaser, and this reason is removed by the purchaser returning him.—The master may therefore take from the creditors whatever he had paid to them in compensation;—in the same manner as where an usurper sells and delivers to the purchaser the article usurped, and pays a compensation for the value to the owner, and the purchaser afterwards returns the article upon a discovery of defect,—in which case the usurper is entitled to give the usurped article to the owner, and to recover from him the value which he had paid in compensation.

If a master sell his licenced slave, being a debtor, giving notice at the same time to the purchaser that the slave is involved in debt, in order that he may have no option of rejection from the slave's defectiveness in being indebted, in this case the creditors are entitled to annul the sale, on account of their right attaching to the slave. Besides, they have a right either to require service of the slave to such a degree as may suffice for the discharge of their demands, or to sell him, and thus pay themselves, either of these modes being attended with a different advantage; for in the former instance the advantage

If the master sell him, at the same time explaining his situation as being involved in debt, the creditors may annul the sale.

is complete, the payment of the whole debt being thereby obtained, but by degrees, and with delay; and in the latter instance it is incomplete, nothing more being procured there than the price for which the slave is sold,—but which is obtained upon the instant.—Hence they have the option either of requiring the slave's service, or of selling him:—but their option is destroyed if the sale in question be valid so as to put it out of their power to dissolve it:—they are therefore entitled to dissolve it. The learned have said that this rule holds only where the price obtained for the slave does not go to the creditors; for where they receive the price, and the sale is not concluded at an under-value, they are not at liberty to dissolve it, as in this case they receive their right. It is to be observed that, in the case here considered, if the master who sold the slave disappear, and the purchaser deny the slave's debts, the creditors are not entitled to litigate the matter with him, according to *Haneefa* and *Mohammed*. *Abou Yoosaf* is of opinion that the creditors are entitled to litigate the matter with the purchaser, and that the *Kazee* must decree them the debt and cause it to be paid to them.—(Analogous to this is the difference of opinion which obtains among our doctors concerning a house, which a person having purchased, makes a gift of, and delivers it to the donee, and then disappears, and the *Shafee* (or person to whom the right of pre-emption appertains) appears and lays his claim to the house;—for according to *Haneefa* and *Mohammed*, he [the *Shafee*] is not at liberty to prosecute the donee,—whereas *Abou Yoosaf* holds a contrary opinion.)—The argument of *Abou Yoosaf* is that, in the case here considered, the purchaser pleads his right of property, and is consequently prepared to litigate with any person who may dispute it with him.—The argument of *Haneefa* and *Mohammed* is that if the plea of the creditors be admitted to lie against the purchaser, it occasions the contract to be broken.—Now the contract has been concluded by both the seller and the purchaser. If, therefore, a decree be passed in favour of the creditors, dissolving the sale, it is a decree operating,
by

by effect, against an absentee, (for the feller is, absent,) which is unlawful.

If a person come to a city where he is unknown, and, declaring himself to be the slave of a particular person, make purchase and sale, in this case any commercial transactions in which he may engage are binding upon him; because he has declared himself a licenced slave; and such declaration is in proof against him. If, also, he make *no* declaration, still his acts are valid, since it is apparent that if he were inhibited he would not have attempted to transact purchase and sale; and in the transactions of mankind appearances are made a ground of practice, in order that the business of life may not be confined within too narrow limits. It is to be observed, however, that the slave in question cannot be sold for the payment of his debts until such time as his master appear; because his declaration cannot be admitted as affecting his person, since he is purely and solely the right of his master.—(It is otherwise with respect to his earnings or acquisitions, those being his own right, for the reasons already explained.)—But if the master appear, and acknowledge that “this person is his licenced slave,” he may then be sold for the payment of his debts, as in this case they are rendered apparent in relation to his master. If, on the contrary, the master should say that “this is not a *licenced* slave,” his declaration must be credited, as inhibition is the original state of slaves, and the master’s assertion in this instance corresponds with what is original.

Case of a person appearing in the character of a licenced slave, and acting as such.

S E C T I O N.

A guardian
may grant a
licence to his
infant ward,
either ex-
pressly,

UPON a guardian granting a licence of trade to his infant ward, such infant becomes, with respect to purchase and sale, the same as a licenced slave, provided he be acquainted with the nature of commerce, so far as to know that in consequence of sale the article sold passes from the property of the seller to that of the purchaser, and that a profit is derived from it:—his acts, therefore, pass and are of force. *Shafei* alleges that his acts do not pass; for as the inhibition of an infant is because of infancy, it necessarily continues during the continuance of infancy; and hence his dealings do not take effect, any more than divorce or manumission pronounced by him. It is otherwise with regard to the *fasting* and *prayer* of an infant, as those are valid;—and so likewise *bequest* by an infant, according to *Shafei*'s tenets; for it is a rule with him that every act which may be performed on behalf of an infant by his guardian, such as purchase and sale, is invalid and of no effect upon proceeding from the infant,—whereas, on the other hand, every act which cannot be performed on his behalf by his guardian, such as fasting and prayer, is valid, proceeding from the infant. The reason of this is, that the acts of an infant are valid only from necessity. Now necessity exists with regard to fasting and prayer, since it is impossible that the fasts or prayers of the infant should be observed or performed by his guardian;—those, therefore, from this necessity, are valid, proceeding from the infant. Purchase and sale, on the contrary, may be transacted by a guardian on behalf of an infant; and hence concerning these this necessity does not exist.—The argument of our doctors is, that the acts of the infant are strictly legal, as proceeding from a competent person, and operating

operating upon a fit subject; for the infant in question is competent to act, since he is capable of expressing himself with propriety, and of distinguishing between right and wrong, upon which circumstances the competency to act depends.—The acts, therefore, of the infant in question are valid and effectual; for infancy occasions inhibition merely because of the infant's being unskilled in dealings, and not because of infancy being in itself a reason for inhibition; and the skill of the infant, in the present instance, may be inferred from the licence granted him by his guardian, since if the infant were not skilled, the guardian would not have granted the licence.

OBJECTION.—If the infant be possessed of skill, and empowered to act, it would follow that his guardian's authority over him terminates; and that the guardian, after having licenced him, has it not in his power to render him inhibited;—whereas it is otherwise.

REPLY.—The continuance of the guardian's authority is for the infant's advantage, in order that benefit may be derived to him in two ways,—in one way, by the infant acting for himself,—and in another way, by the guardian acting on his behalf. The continuance, on the other hand, of the guardian's power to impose inhibition upon the infant, is because of the possibility of a change in the infant's state or condition; and he is accordingly entitled to inhibit the infant after having licenced him. It is otherwise with respect to divorce or manumission pronounced by the infant, for those are invalid, as being particularly prejudicial; and accordingly an infant is incapable of divorcing his wife, or manumitting his slave.—In short, an infant is competent to any act purely of an advantageous nature, (such as the acceptance of a gift, or alms,) previous to obtaining the licence of his guardian, whereas, in matters which may be either advantageous, or otherwise, (such as purchase and sale,) he is competent *after* having obtained his guardian's licence, not *before*.

before. If, however, he transact a purchase or sale before having obtained his guardian's licence, the validity of it depend upon his [the guardian's] approbation, as such purchase or sale may possibly be attended with advantage. It is to be observed that the office and denomination of guardian * of an infant extends to his father or father's executor, and also to his grandfather, and to the *Kázee*, or other executive magistrate. It is otherwise with respect to those whose situation is merely conditional, (namely, governors of cities or districts, such as the *Ameer* of *Bokhàrá*,) for as those have not the power of appointing a *Kázee*, they cannot grant an infant a licence to trade. From what is mentioned above, that "a licenced infant becomes the same as a licenced slave," it may be inferred that all the laws which apply to the latter apply to the former likewise; because licence operates as a removal of inhibition, after which the licenced person acts in virtue of his own competency, whether he be a slave or an infant:—hence his acts or dealings are not restricted to any particular description.

or virtually,
by acqui-
escence;

If the infant above mentioned transact purchase and sale, and his guardian, perceiving this, remain silent, the infant becomes licenced, in the same manner as a slave.

and the in-
fant's ac-
knowledge-
ments are
then valid:

If a licenced infant make an acknowledgment in favour of any person, affecting the acquisitions in his hands, such acknowledgment is valid,—(and so likewise his acknowledgment affecting any thing which may have come to him by inheritance, according to the *Zâbir Rawâyet*,)—in the same manner as an acknowledgment made by a licenced slave.

* Arab. *Wallée*.—Some lexicons pronounce it (perhaps more accurately) *Willée*.

A LICENCED infant is not at liberty to contract in marriage his slave or his *Mokâtib*, any more than a licenced slave. It is also to be observed that an occasional lunatic, acquainted with the nature of purchase and sale, is the same as an infant, and becomes licenced by the authority of his father or grandfather, or of his father's executor, but not of any other, as was before explained; and he is also subject to the same laws with the infant.

but he cannot contract his slaves in marriage. Case of a lunatic.

H E D A R A.

B O O K XXXVII.

Of GHAZB, or USURPATION.

Definition of
the term.

As by which
usurpation is
established.

GHAZB, in its literal sense, means the forcibly taking a thing from another. In the language of the LAW it signifies the taking of the property of another, which is valuable and sacred, without the consent of the proprietor, in such a manner as to destroy the proprietor's possession of it;—whence it is that usurpation is established by exacting service from the slave of another, or by putting a burden upon the quadruped of another; but not by sitting upon the carpet of another; because by the use of the slave of another, and by loading the quadruped of another, the possession of the proprietor is destroyed; whereas by sitting upon the carpet of another the possession of the proprietor

prietor is not destroyed.—It is to be observed that if any person knowingly and wilfully usurp the property of another, he is held in law to be an offender, and becomes responsible for a compensation. If, on the contrary, he should not have made the usurpation knowingly and wilfully, (as where a person destroys property on the supposition of its belonging to himself, and it afterwards proves the right of another,) he is in that case also liable for a compensation, because a compensation is the right of man; but he is not an *offender*, as his erroneous offence is cancelled.

A wilful
usurper is an
offender.

If a person usurp any thing of the class of similars, such as articles estimable by weight, or by measurement of capacity, and of which the particulars are nearly equal, and it be afterwards destroyed in his possession, he is in that case responsible to the proprietor for a similar; because God has so ordained in the KORAN; and also, because the giving of a similar in return is the justest method, since a regard is thereby shewn both to the *genus* and the *substance*, and consequently the injury to the proprietor is thereby removed in the most eligible manner. If, however, the usurper be not able to give a similar, because of no similar being to be found, he in that case becomes responsible for the value which the article bears at the time of the suit or contention. This is according to *Haneefa*. *Abou Yoosaf* maintains that he becomes responsible for the value the thing bore upon the day of usurpation. *Mohammed*, on the other hand, has said that he becomes responsible for the value it bore upon the day when the similar was not to be found or procured. The reasoning of *Abou Yoosaf* is, that whenever a similar became unattainable, the thing then became the same as if it was not of the class of similars. Hence it is necessary to have regard to the value on the day of usurpation; because usurpation being the cause which induces responsibility, it follows that the value on the day of the establishment of the cause ought to be regarded. The reasoning of *Mohammed* is, that the usurper is responsible for a *similar*; and that, as this responsibility is afterwards referred

The usurper
of an article
of the class of
similars is re-
sponsible for
a similar, if
it be destroyed
in his posses-
sion.

to the value, for no other reason than that a similar is not to be found, it follows that regard is to be had to the value the article bore on that day *. The reasoning of *Haneefa* is, that the responsibility is not referred to the value immediately upon the extinction of a similar, since the proprietor may, if he please, delay until a similar shall be found: but that the responsibility is referred to the value merely on account of the decree of the *Kâzee*; and that therefore the value on the day of contention (which is the day of the decree of the *Kâzee*) ought to be regarded. It is otherwise with respect to a thing which is not of the class of similars; because in such case the value is demanded from the usurper in virtue of the original cause, namely, the usurpation; and therefore the value it bore *on the day of usurpation* is to be regarded.

If the article be of the class of *non-similars*, he is responsible for the value.

If a person usurp any article of the class of *non-similars*, (such as where the particulars are different, like household goods,) he is in that case responsible for the value the article bore on the day of usurpation; for as it is here impossible to preserve the right of the proprietor with respect to *quality*, it is therefore necessary to preserve that right with respect to *substance* only, in order that the injury to him may be done away in the utmost possible degree. (It is to be observed, that if a person usurp wheat in which there is a mixture of barley, he becomes then responsible for the value, as that is of the class of non-similars.)

The actual article usurped must be restored to the proprietor, if it be extant,

It is incumbent upon an usurper to restore the identical article usurped to the proprietor of it, provided it be extant in his possession; because the prophet has said, “*It is incumbent upon a person who takes a thing from another to restore it to him;*” and also, “*It is not lawful for a person to take the goods of his brother in any manner;*” (that is,

* Arab. *Yawm-al-Inkattâ*.—Literally, the day of termination; meaning, the day on which the power of returning a compensation by a similar terminated.

neither in a *familiar easy* way, nor by *violence and contention*;) “and
 “therefore, if a person do take any thing, he must restore it to its
 “owner;”—and also, because the proprietor’s seizure or possession of
 his property being his own right, which the usurper has destroyed,
 it is therefore incumbent on the usurper to restore the right to its
 owner,—that is to say, to give back the actual thing taken. This,
 moreover, is what is originally incumbent, agreeable to the opinion
 of most of the learned; and the giving of the value to the proprietor
 is merely a cause of release from strife, inasmuch as it is defective;
 whereas the perfection lies in the restoration of the actual thing. Some
 of the learned, however, have said that the original obligation is that
 of giving the value; and that the restitution of the actual article is
 merely a *cause* of release. A result of this disagreement appears in the
 different deductions arising from it; as where, for instance, the pro-
 prietor exempts the usurper from the value, at a time when the actual
 thing is extant in his possession; in which case, according to the latter
 opinion, (above mentioned, of *some* of the learned,) the exemption is
 valid; whence if the article be destroyed in the possession of the
 usurper subsequent to the exemption, he does not (according to their
 tenets) become responsible for a compensation; whereas, in the opi-
 nion of *most* of the learned, he becomes responsible. It is to be ob-
 served that, according to the opinion of *most* of the learned, it is in-
 incumbent upon the usurper to restore the thing to the proprietor in the
 place where he had usurped it, because the value of things varies in
 different places.—If the usurper plead that he has *lost* the article, the
 magistrate must cause him to be imprisoned for a length of time suf-
 ficient to ascertain whether or not he has the thing in his possession,
 and must then enjoin him to give the value of it. The reason of this
 is, because the original obligation is the restoration of the actual thing,
 and the circumstance of the *loss* of it being merely an *accident*, is not
 credited, as it is contradicted by appearances; in the same manner as
 where a person who owes the price of goods pleads poverty, in which
 case he must be confined until the truth of his plea be ascertained.—

in the place
 where it was
 usurped;

and failing of
 this, the
 usurper must
 be imprisoned
 until he make
 satisfaction.

Usurpation
(so as to oc-
casion re-
sponsibility)
cannot take
place but in
moveable
property.

Whenever, therefore, it becomes known that the article usurped has really been lost in the possession of the usurper, the obligation to restore the actual thing is annulled, and a compensation (that is, the value of the thing) becomes obligatory. It is further to be observed, that usurpation (so as to occasion responsibility) takes place only with respect to moveables, such as a garment, or the like; for the destruction of the proprietor's possession cannot otherwise be effected than by *removal*. If, therefore, a person should usurp *land*, and the land be destroyed in his possession, (that is, be rendered useless by an *inundation*, or the like,) the usurper is not responsible for it. This is the opinion of *Haneefa* and *Aboo Yoosaf*. *Mohammed* alleges that the usurper is responsible for the land; and this is the first opinion of *Aboo Yoosaf*, which has likewise been adopted by *Shafei*. The arguments in favour of the latter opinion are, that the possession of the usurper is established with respect to the land usurped, which occasions a destruction of the proprietor's possession, since it is impossible that one thing can be in the possession of two people at one and the same time.—*Usurpation*, therefore, which means the annihilation of the *proprietor's* possession, and the establishment of the *usurper's*, exists in the case of land: hence land is in this respect the same as moveable property, and therefore the usurper of it is responsible for it; in the same manner as a denying trustee; that is, if a person deposit land in the hands of another, and that other afterwards deny the deposit, in that case he becomes responsible for the land, and so also in the case in question. The arguments of *Haneefa* and *Aboo Yoosaf* are, that usurpation is the establishment of the usurper's possession by a destruction of that of the proprietor, in such a manner that the cause of the *establishment* of the possession, and of the *destruction* of it, is the action of the usurper with respect to the thing usurped, such as the removal of it from one place to another. Now this is impracticable with respect to land or houses, because the proprietor's possession of these cannot otherwise be destroyed than by driving him from them. But the driving away of the proprietor from his *house* (for instance) is not an action of the
usurper

usurper with respect to the thing, but with respect to the person of the proprietor, and therefore amounts to the same as if he were to remove the proprietor from his cattle. In the usurpation of *moveables*, on the contrary, the removal is the action of the usurper operating with respect to the *article*; and this is usurpation. With respect to the case of a trustee who denies the deposit, (adduced by *Mohammed* as being analogous to the case in question,) it is not admitted to be such; but allowing that it were, it is answered that the necessity for a compensation in that instance arises from the want of care which is manifested by the denial of the trustee.

AN usurper is responsible, according to all our doctors, for whatever he breaks of a house, either by his residence in it, or by his pulling it down, because that is a wilful destruction, and compensation for fixed property is incurred by wilful destruction,—as where, for instance, a person removes the manure or water from land, that being an act with respect to the substance of the land.

The usurper of a house is responsible for the furniture:

IF a person usurp a house, sell it, and deliver it to the purchaser, and afterwards acknowledge the usurpation, and the purchaser deny it; and there be no witnesses on the part of the proprietor to prove it, in this case there is a disagreement between *Haneefa* and *Aboo Yoosaf* on one side, and *Mohammed* on the other; for, according to the two disciples, the seller of the house is not responsible on account of the sale and delivery of it to the purchaser; (contrary to the opinion of *Mohammed*;) because sale and delivery to the purchaser is merely an *usurpation* on the part of the seller; and usurpation of moveable property (according to the two disciples) does not induce compensation.

but if he sell the house, and the proprietor have no witnesses, he is not responsible.

IF usurped land be damaged by the cultivation of it, the usurper must compensate for the damage, since he has destroyed part of the land.

A usurper of land is responsible for

any damage
occasioned by
the cultiva-
tion of it.

land.—He must, moreover, deduct from the produce of the land the amount of his stock, that is to say, the quantity of the seed sown, and also the amount he may have paid for the damage; and if any surplus should then remain, he must bestow it in charity.—The compiler of the *Hedaya* remarks that this is according to *Haneefa* and *Mohammed*; but that *Aboo Yoosaf* has said that it is not necessary to bestow the surplus in charity. Their arguments shall be recited at large hereafter.

The usurper
of a *moveable*
is responsible
for the value
in case of its
destruction.

WHEN an article of usurped *moveable* property is destroyed in the possession of the usurper, whether by his act, or by the act of another, in either case he is responsible for the value of it:—according to those who hold that the giving of the value is originally incumbent, and the restitution of the actual thing a release, because the releasement being here impracticable, the giving of the value which was originally due is therefore established;—and also according to those who hold that the restitution of the actual thing is originally due, and that the giving of the value is merely subordinate thereto; because the fulfilment of what is originally due being impracticable, in consequence of the destruction of the actual thing, the value of it is therefore due.

If he himself
render it de-
fective, he is
responsible for
such defect,

If an usurper should, with his own hands, render defective the thing he had usurped, he is in that case responsible for such deficiency; for as, in consequence of the usurpation, he is responsible for the thing usurped, *in all its parts*, it follows that whenever the restitution of any part of it becomes impracticable, the *value* of that part is due from him. It is otherwise with respect to a diminution of the value by depreciation; since for that the usurper is not responsible, provided he restore the thing in the place of usurpation; because a diminution of the price arises from the diminution of desire on the part of the purchaser, and not from the ruin or destruction of any of the parts of the thing.—It is also otherwise with respect to things sold which become defective

but not for
any deprecia-
tion it may
have sustained
in his hands.

defective in the possession of the seller prior to his delivery of them; for he is not in that case under a necessity of compensation to the purchaser; because responsibility for the article of sale is a responsibility involved in the contract; and the subject of the contract is the actual wares, and not the *qualities* of them. With respect to usurpation, on the contrary, that is an *act*, and qualities are liable to be compensated for by an act, but not by a contract, as has been already demonstrated. The author of the *Hedaya* has said that this case alludes to usurped articles which are not of an increasing nature; but that with respect to things of an increasing nature, a compensation for the damage must not be taken along with the actual restitution, as that would necessarily induce usury.

If a person usurp a slave, and hire him out to work, and receive his wages, and the slave be thereby affected in his value, in that case (upon the principle laid down in the preceding example) the usurper must compensate for the damage, and must bestow the whole of the wages in charity. The compiler of the *Hedaya* remarks that this is according to *Haneefa* and *Mohammed*; but that according to *Aboo Yoosaf* there is no necessity for his bestowing the wages in charity: and that the same disagreement subsists with respect to the case of a borrower hiring out the subject borrowed. The reasoning of *Aboo Yoosaf* is, that the profit in question has been acquired by the usurper upon his responsibility with respect to the subject, and upon his own property: the former of which, namely responsibility, is evident; and so likewise his right of property; because whatever is a subject of responsibility becomes the property of the usurper, in consequence of his making compensation, by the way of transition. The reasoning of *Haneefa* and *Mohammed* is, that the profit in question has been acquired by a cause in which baseness exists, namely, by an exertion over the property of another; and that such profit ought to be bestowed in charity; because the *cause* (that is, the exertion over the property of another) is the trunk, and the profit so acquired is a

The usurper of a slave, hiring him out to service, is responsible for any damage he may sustain, and must bestow the wages in charity:

(but if the
slave be de-
stroyed, the
wages may be
given in part
of the com-
pensation.)

branch from it; and the qualities of the *trunk*, or *original*, communi-
cate with the branches springing from it; whence a baseness exists in
the *profit* also, as well as in the *original*. With regard to what *Abou*
Yoozaf alleges, that "whatever is a subject of responsibility becomes
"the property of the usurper, in consequence of his making com-
pensation, by the way of transition," it is answered that a right of pro-
perty established merely by the way of transition is a *defective* right of
property, and therefore baseness is not removed by it. If, however,
the slave be destroyed in the possession of the usurper, so as to make
him liable for his complete value, he may in that case give the wages
in payment of the compensation, because the baseness which exists
with regard to such wages is only on account of the right of the pro-
prietor; (whence, if they were paid to the proprietor, it would be
lawful for him to receive and convert them to his own use:) they
may therefore be paid to him; and, in consequence of such payment,
the baseness which would otherwise attach to them is removed. It is
different where the usurper sells the slave, who is afterwards destroyed
in the possession of the purchaser, and is then proven to be the right
of another, for which the purchaser pays a compensation, because in
such case it is not lawful for the usurper to give the wages to the pur-
chaser in payment of the price, since the baseness which exists in the
wages is not on account of the right of the purchaser. Still, how-
ever, if the usurper, in this case, be not possessed of any other pro-
perty than the wages, he may then lawfully give that to the pur-
chaser in return for the price which he had taken from him, because
under these circumstances the usurper stands in need of it, and he is
therefore permitted to apply it to the answering of his necessities. If,
however, he should afterwards acquire other property, he must be-
stow from it in charity an amount equal to the wages, provided he
was rich at the time he made use of the price he received from the
purchaser; but if, on the contrary, he was at that time poor, he is
~~not~~ required to bestow any thing in charity.

If a person usurp one thousand *dirms*, and with those thousand purchase a female slave, whom he afterwards sells for *two* thousand, and then with these two thousand purchase another female slave, whom he again sells for *three* thousand, in that case the usurper must bestow in charity the whole of the profit, namely, two thousand *dirms*. This is according to *Haneefa* and *Mohammed*; and the principle of it is, that whenever either an usurper or a trustee perform any act with respect to the thing usurped, or the deposit, and thereby acquire profit, such profit (according to *Haneefa* and *Mohammed*) is not lawful and sanctified to them; in opposition to the opinion of *Aboo Yoosaf*. The opinion of *Haneefa* and *Mohammed*, in this particular, with regard to a *deposit*, is evident, since the property of it is not referred to a period antecedent to the act of the trustee; for, as the property cannot be proven from responsibility at that time, it follows that the act of the trustee was not exerted upon his own property. It is to be observed, however, that what is here mentioned of the opinion of *Haneefa* and *Mohammed* being evident with regard to a deposit, alludes to such deposits only as consist of goods, and not of money; for if the deposit consist of money, and the trustee, at the time of purchasing the female slave, say "I purchase her with this money," (pointing to the identical money in deposit,) and he accordingly discharge the price with that very money, in that case the profit must be bestowed in charity; whereas if, on the contrary, at the time of making the bargain, he point to the money in deposit, and pay the price with other money,—or point to other money, and pay the price with the *deposited* money,—or, if he should not point to any money, but express himself in an absolute manner, saying "I purchase this " slave for one thousand *dirms*," (not "for *these* thousand *dirms*,"") and he pay the price with the thousand *dirms* in deposit,—in all these cases the profit acquired is free and lawful to the trustee. Such also is the opinion of *Koorokhee*; and the reason of it is, that by pointing to specific *dirms* at the time of purchasing, the *dirms* are not thereby rendered fixed and specific, but that, on the contrary, it is lawful for

All monied profits acquired by means of usurped money must be bestowed in charity:

the purchaser to give other *dirms* than those referred to; and that therefore, in such case, the profit acquired is not base; excepting when, in purchasing the said slave with the thousand *dirms* in deposit, he points to these very *dirms*, and pays the price with the same.—The *Haneefite* doctors, on the contrary, allege that the profit is not lawful to the trustee, neither before the giving of compensation, nor after it: and this is approved; because this law has been recited in an absolute manner, both in the *Jama Sagheer* and the *Jama Kabeer*, in treating of *Mozáribat*.

the purchaser to give other *dirms* than those referred to; and that therefore, in such case, the profit acquired is not base; excepting when, in purchasing the said slave with the thousand *dirms* in deposit, he points to these very *dirms*, and pays the price with the same.—The *Haneefite* doctors, on the contrary, allege that the profit is not lawful to the trustee, neither before the giving of compensation, nor after it: and this is approved; because this law has been recited in an absolute manner, both in the *Jama Sagheer* and the *Jama Kabeer*, in treating of *Mozáribat*.

but not profits of any different description.

IF a person purchase with one thousand usurped *dirms* a female slave worth two thousand, and make a gift of her to any person; or purchase wheat with the said thousand, and eat the same; he is not, under such circumstances, required to bestow any thing in charity. This is a case in which all are agreed; and the principal of it is, that although the female slave be worth two thousand *dirms*, yet she is not of the species of *dirms*, so as to occasion usury; for usury does not take place excepting when the profit is of the same description as the principal.

SECTION.

Of usurped Articles altered by Acts of the Usurper.

An alteration wrought upon the article usurped vests the property of it in the usurper; who remains re-

WHENEVER an article usurped is altered in consequence of an act of the usurper, in such a manner that it loses both its name and its original purpose, it is then separated from the right of the proprietor, and becomes the property of the usurper, and the usurper becomes responsible for it; but he is not entitled to derive any advantage from it

it until he pay the compensation. An example of this occurs where a person usurps a goat, kills it, and afterwards roasts or boils it; or usurps wheat, and afterwards grinds it into flour;—or usurps iron, and makes a sword from it;—or usurps clay, and makes a vessel from it. What is here advanced is according to our doctors. *Shafëi* maintains that, after the alteration in the article, the right of the proprietor to it is not extinguished, but he is entitled to take from the usurper the flour of his wheat. There is also a report from *Abou Yoosaf* to the same effect. He, however, maintains that in case the proprietor chuse to take the flour of the wheat, he is not entitled to a compensation for the damage, as that would induce usury; whereas *Shafëi* holds that he is entitled to a compensation from the usurper for the damage. It is also related, as an opinion of *Abou Yoosaf*, that the right of property with respect to an usurped article which has been altered ceases in the proprietor, but that it may be sold to answer the debt due to him, (namely, the compensation,) and that, in case of the death of the usurper, he has a preferable claim to the other creditors with respect to the article in question. The reasoning of *Shafëi* is, that the substance of the thing being extant, notwithstanding it have undergone an alteration, it follows that the right of property still remains in the proprietor, since the quality is merely a dependant on the substance;—as where, for instance, the wind blows wheat into the mill of another person, and it is ground into flour; in which case it continues the property of the original proprietor of the wheat; and so also in the case in question. With respect to the act of the usurper by which the thing is altered, it is not to be regarded, since it is an unlawful act, and consequently incapable of becoming the cause of property, as has been explained in its proper place. The case is therefore the same as if the act had never existed;—in the same manner as holds where an usurper kills an usurped goat, and tears the skin of it in pieces. The argument of our doctors is, that in the case in question the usurper has performed an operation which bears a value, and has therefore destroyed the right of the proprietor in one respect, inasmuch

sponsible to the original owner for the value of it; and cannot lawfully derive any advantage from it, until such compensation be paid.

inasmuch as the appearance is no longer the same, whence it is that the name is changed, and many of the original purposes of the article defeated; as grains of wheat, for instance, which are fit for being sown or roasted, but after being converted into flour are no longer fit for these purposes. In short, by the alteration of an article usurped the right of the proprietor is destroyed in one shape, and that of the usurper with respect to the *qualities* is established in *every* shape; and hence the right of the usurper has a superiority with respect to the original of that thing which has been in one shape destroyed. (With respect to the act of the usurper, it is not made the occasion of property because of its illegality, but because of its being the performance of a valuable operation. It is otherwise with regard to a goat slain by the usurper, and the skin of it torn to pieces; for, after the killing of a goat, and the destruction of its skin, the name of *goat* is still retained, since it is common to say “*a slaughtered goat*.” With respect to what has been recited, that “the usurper is not entitled to derive “any profit from the article until he pay the compensation,” it is according to a favourable construction of the law. Analogy would lead us to conclude that it is lawful to derive a profit from the article before the payment of a compensation. This is the opinion of *Haffan* and *Ziffer*, and there is also a report to that effect from *Haneefa*, of which the relater is the lawyer *Abou Lays*. The reason derived from analogy is because, after the alteration, the usurper becomes the proprietor of the thing, and may therefore perform any act with respect to it, or derive profit from it, in the same manner as he might lawfully give it away or sell it. The reason, however, for a more favourable construction is, that in the days of the prophet a goat having been killed and roasted without the consent of the proprietor, the prophet ordered that the prisoners should be fed with it, meaning, that it should be bestowed in *charity* upon them. Now this order of the prophet evinces that upon an alteration in the state of an article usurped, it is separated from the property of the proprietor, and that it is unlawful for the usurper to derive a profit from it until he have satisfied the proprietor.

proprietor. Moreover, if it were lawful to the usurper under these circumstances to take a profit, a door would be opened for usurpation; and, therefore, to prevent such mischievous consequences, the acquisition of a profit before satisfaction being made is not permitted. With respect to the assertions of *Hassen* and *Ziffer* adduced in support of their opinion, that "the gift or the sale of the thing is lawful;" it is answered, that notwithstanding the illegality of deriving profit from the article usurped, still the sale or gift of it is lawful, because the article in question is the *property* of the usurper, and the gift or sale of property held under an invalid right is lawful. Where, however, the usurper makes a compensation for the thing usurped, he is entitled to derive an advantage from it, because the right of the proprietor has been transferred to him in consequence of his making compensation; and it becomes the same as an exchange between the usurper and the proprietor with their mutual consent. In the same manner, also, he is entitled to derive profit from the thing in question when the proprietor exempts him from responsibility for it; because in consequence of such exemption the right of the proprietor ceases; and so likewise where the proprietor *takes* the compensation from the usurper, or where he demands it and the usurper assents thereto, as in that case the consent of the proprietor is obtained; and so also where the *Kázee* passes a decree directing the usurper to pay a compensation to the proprietor,—or where the usurper pays the compensation upon the decree of the *Kázee*, because in that case likewise the consent of the proprietor is obtained, since the *Kázee* passes the decree at his suit. It is to be observed that in the same manner as a disagreement subsists between our doctors and *Shaf'ei* concerning these cases, so likewise with respect to the case of a person usurping wheat and sowing it, or usurping the stones of dates and planting them. In the opinion of *Abou Yoosaf*, however, it is lawful even in these cases for an usurper to enjoy profit before the payment of compensation, because in both these cases the usurper has destroyed the substance of the thing usurped in every respect. It is otherwise in the cases before recited; for in those

those instances the usurper is not entitled to derive profit, since there the substance of the article continues in one respect extant. In the case, therefore, of sowing usurped wheat, it is not necessary (according to *Aboo Yoosaf*) to bestow in charity such part of the produce of it as exceeds the quantity sown and the expence of the labour; contrary to the opinion of *Haneefa* and *Mohammed*, as has been already explained.

Any alteration wrought upon gold or silver does not transfer the property of it.

If a person usurp gold or silver, and convert it into *dirms* or *deenars*, or make a vessel from it, such silver or gold does not separate from the property of the proprietor, according to *Haneefa*,—whence he is entitled to take it from the usurper without giving him any compensation. The two disciples maintain that the usurper, in such case, acquires a property in the metal, and owes a compensation of a similar quantity of gold or silver to the original proprietor; because he has performed a valuable operation upon the metal, which in one shape destroys the right of the proprietor, since in so doing he has broken it down so as to destroy its original purposes, inasmuch as *bullion* is unfit to become the stock in a contract of *Mozáribat*, or of partnership, whereas coined money has this fitness. The reasoning of *Haneefa* is, that in the case in question the substance of the thing usurped is extant in every respect, inasmuch that it still preserves its name; and the purposes to which gold and silver relate, such as price and weight, are also extant, inasmuch that usury by weight takes place in them when coined, in the same manner as before coinage.—With regard, moreover, to the fitness of them (when coined) for constituting stock, it is an effect of the workmanship, and not a quality inherent in the *substance* of the thing. Besides, the workmanship in question does not always increase the value, but is sometimes attended with value, and sometimes not; as where, for instance, genus is opposed to genus,—in which case workmanship is of no value.

If a person usurp a beam, and build a house upon it, the beam is in that case separated from the property of the proprietor, and the usurper must make a compensation to him for the value of it. *Shafëi* maintains that the proprietor is entitled to take it. The arguments of the two parties on this point have been already recited; but in this case there is another reason in addition to those of our doctors, namely; that if (according to the opinion of *Shafëi*) the proprietor were to take the beam, an injury would result to the usurper, as his house would thereby be demolished without his receiving any compensation.—Where, on the contrary, (according to the opinion of our doctors,) the beam is separated from the property of the proprietor, and becomes the property of the usurper, although an injury be thereby occasioned to the proprietor, yet that is done away by the usurper making compensation. The case is, therefore, analogous to one where an usurper sows the belly of his male or female slave with an usurped thread*, or inserts an usurped plank into his own boat; for in these cases the proprietor is not permitted to take away the thread or the plank, but is entitled to a compensation for their value.

The construction of a building upon an usurped beam transfers the property of the beam to the usurper.

If a person usurp and slay the goat of another, the proprietor has it in that case at his option either to take a compensation for the value from the usurper, making over the goat to him, or to keep the goat, receiving from the usurper a compensation for the damage done by slaughtering it. Such also is the law with respect to a camel; or where a person cuts off one of the legs of a goat or camel belonging to another. This is according to the *Zâbir Rawâyet*; and the reason of it is, that a destruction of the animal is occasioned in one respect in a termination of many of its uses, such as milk, and progeny, and the transportation of burdens, whilst some of its uses still continue, such as that of the *flesh*, for instance; whence the case is

In the case of slaying an usurped animal, the proprietor has an option of taking the carcase, (receiving a compensation for the damage,) or making it over to the usurper for the value.

* This is the literal meaning in both the *Arabic* and *Persian* version; but what custom or particular operation it alludes to, the translator has not been able to discover.

similar to that of a large rent in cloth. If, however, a person slay or cut off the leg of a quadruped of which the flesh is not edible, the proprietor is entitled to take from him a compensation for the whole of the value; for in such case the slaying or maiming is in every respect a destruction. It is otherwise where an usurper cuts off the hand or foot of a male or female slave; for in that case the proprietor must receive back the slave, together with the fine, since the capability of yielding profit still exists in man after the loss of a foot or a hand.

A *small* damage committed upon usurped cloth does not transfer the property of it; but a *considerable* damage gives the proprietor an option of taking it back, (with a compensation for the damage,) or making it over to the usurper for the value.

If a person tear a piece of cloth, the property of another, so as to occasion a *small* rent in it, he is in that case responsible for the damage, and the cloth remains with the proprietor, since the substance of it is extant in every respect, nothing more having happened to it than a *defect*;—whereas, if the rent were large, so as to destroy many of its uses, the proprietor would in that case have it in his option either to take the whole of the value from the usurper and give him the cloth, (since he has destroyed it in every respect, even as much as if he had burnt it,) or to keep the cloth and take a compensation for the damage; because a large rent is in one respect merely a *defect*, inasmuch as the substance of the cloth is still extant, as well as some of its *uses* likewise. It is to be observed that what is recited by *Kadooree* upon this subject, implies that a *large* rent is such as occasions a destruction of *many* of the advantages. In fact a *large* rent is such as occasions a destruction of some of the parts of the cloth, and also of some of its uses; some of the parts and some of the uses still remaining, (as where, for instance, before the accident of the rent, the cloth was capable of being made into an upper or under garment, and afterwards loses that capability;) whereas a *small* rent is such as does not induce a destruction of any of the uses, but merely occasions a damage; for *Mohammed*, in the *Mabsoot*, has said “the cutting of a garment is a great damage, “notwithstanding it occasion only a destruction of some of the “uses.”

If a person usurp land, and plant trees in it, or erect a building upon it, he must in that case be directed to remove the trees and clear the land, and to restore it to the proprietor; because the prophet has said "*there is no right over the seed of the oppressor*," (alluding to the planting of trees;) and also, because the property of the proprietor still exists as it did before, since the land has not been destroyed, nor has the usurper become proprietor, inasmuch as he cannot become the proprietor but by some one of the causes which establish property, of which none here exist. In this case, moreover, usurpation is not established*; and therefore the person who has so employed the land of another is ordered to clear and restore it to the owner, in the same manner as in the case of his putting his food into the vessel of another. If, however, the removal of the trees or the building be injurious to the land, the proprietor of the land has, in that case, the option of paying to the proprietor of the trees or the building a compensation equal to the value they would bear when removed from the ground, and thus possessing himself of them; because in this there is an advantage to both, and the injury to both is obviated. By the expression "paying a compensation equal to the value they would bear when removed," is to be understood *paying the value which the trees or house bear upon the proprietor being directed to remove them*; because his right exists only with respect to the trees or building "*as required to be removed*," since he is not at liberty to leave them upon the ground. It is therefore requisite to appreciate the land *without* the trees or the building, and afterwards to appreciate it *with* the trees or building, (as removeable at the landholder's desire;) and whatever may be the excess of the second appreciation over the first is the

Case of plant-
ing or build-
ing upon
usurped land.

* There appears, at first sight, a sort of incongruity in opening the case "If a person *usurp*, &c." and then saying "usurpation is not established."—The expression, however, only means that "usurpation, *in the sense of the LAW, as requiring atonement*, is not established," the reason of which is, that usurpation cannot take place with respect to fixed property, as has been already explained; see p. 526.

amount of the compensation which the proprietor of the land is required to pay to the proprietor of the trees or building.—(It is to be observed that the value of trees or of a building which are liable or required to be removed is less than that of trees or a building which are permitted to stand, since the expence of removal must be deducted from the value of trees or buildings which are removeable.)

Case of dying
usurped cloth;
or grinding
usurped
wheat into
flour.

If a person usurp the cloth of another and then dye it red, or the flour of another and then mix it with oil, in that case the proprietor has the option of taking from the usurper a compensation equal to the value of the white cloth, or an equal quantity of flour, giving the red cloth or the mixed flour to the usurper,—or, of taking the red cloth or the mixed flour, giving to the usurper a compensation equal to the additional value these articles may have acquired from the red dye, or the mixture of oil. *Shafei* maintains that in the case of dyed cloth the proprietor of it has a right to take it, and then to tell the usurper to separate and take, to the utmost of his power, his dye from it; for he holds this case to be analogous to that of a plot of ground; (in other words, if a person usurp a piece of ground belonging to another, and afterwards erect a building upon it, the proprietor is entitled to take the ground, desiring the usurper to dig up and carry away his building;) because the separation of a dye from stained cloth is equally practicable with the removal of a building from the ground on which it stands. It is otherwise in the case of oil mixed in flour, because the separation of the oil is then impracticable. The argument of our doctors is that, in what they have advanced on this point, an attention is shewn to the interests of both parties, an option, however, being allowed to the proprietor of the cloth, as he is the original. It is otherwise in the case of a plot of ground; for in that instance the usurper is entitled to the fragments of the house after its being pulled down (that is, to the bricks, wood, &c.) whereas a dye, when separated from cloth, is lost, and cannot be collected by the usurper of the cloth. It is also otherwise in the case of a garment blown by the
wind

wind into the vat of a dyer, and becoming stained in consequence; for in that case the dyer is not responsible for the garment: on the contrary, the proprietor of the garment must take it so stained, and pay to the dyer the value of his dye, as in this case no degree of blame is imputable to him. It is to be observed that *Aboon Affama* has said that when a person usurps the cloth of another, and dyes it, the proprietor of the cloth may, if he please, sell it, and deduct from the price a proportion equal to the value of the white cloth, and give to the dyer a proportion equal to the value of his dye; for as the proprietor of the cloth has it in his power to refuse taking the dye and paying a compensation for its value, it follows that when he *does* refuse to take it, the cloth must be sold, that he may receive his proportion, and that the interests of both may be attended to. This reasoning of *Aboon Affama* equally holds in the case where a garment is stained in consequence of being blown by the wind into the vessel of a dyer; and in the same manner, the reasoning adduced in the case of cloth equally holds in the case of flour. As flour, however, is of the class of similars, it must be compensated for by a similar; whereas cloth, as being an article of price, must be compensated for by a payment of its value. *Mohammed*, in the *Mabsoot*, has said that flour must also be compensated for by value, because flour is altered by being baked, and is no longer of the class of similars. (Some have explained the meaning of the *value* of flour to be a *similar quantity*; and that *Mohammed* has used the term *value* instead of *similar*, because a *similar* is an *equivalent*, in the same manner as *value*.) It is to be observed that a yellow dye is the same as a red dye; but that with regard to a black dye there is a difference of opinion; *Haneefa* holding it to be a defect, whereas the two disciples maintain that it is not a defect, but, on the contrary, the cause of additional value. Some have said that this difference of opinion arises from the different periods of time; and others have said that if the cloth be of such a nature that a black dye occasions a diminution of its value, the dying of it must in that case be considered as a damage or defect; but that if it be of such a kind as to receive an in-

crease

crease of value from a black dye, the black dye is the same as a *red* dye. If, however, the usurped cloth be of such a nature that a red dye occasions a diminution of its value, (as if, for instance, the value of it having been thirty *dirms*, it should, after receiving the red dye, be worth only twenty *dirms*,) in that case it is related as an opinion of *Mohammed*, that regard must be had to the *additional* value which the red dye may have occasioned in some other piece of cloth; and if it amount to five *dirms*, that then the proprietor of the cloth has a right to take it, and to receive, besides, five *dirms* from the usurper; for the proprietor of the cloth is entitled to a compensation of ten *dirms* from the usurper for the amount of the damage occasioned to his cloth; and the usurper is entitled to five *dirms* from the proprietor as the value of his dye, having operated that increase upon *another* piece of cloth. Hence the proprietor is entitled to take five *dirms* from the usurper, and the remaining five is cancelled by the value of the dye thus estimated at five *dirms*.

SECTION.

An usurper, damaging the article usurped, becomes proprietor of it upon the owner demanding the value;

If a person usurp any article of goods or furniture*, and damage it, and the proprietor demand a compensation for the value from the usurper, he [the usurper] in that case becomes the proprietor of such article, according to our doctors. *Shafëi* maintains that the usurper does not become proprietor, because the act of usurpation, as being oppressive and illegal, is therefore incapable of occasioning a right of property; in the same manner as where a person usurps a *Modabbir*,

* Arab. *Rakht wa Mattâ*; household-stuff, &c. as opposed to *Mâl*.—The distinction is fully explained elsewhere.

and injures him, and the proprietor takes from him the value of the *Modabbir* as a compensation for the injury,—in which case he [the usurper] does not thence become proprietor of the *Modabbir*. The reasoning of our doctors is, that in the case in question the proprietor of the article obtains a return for it; and as the article usurped is fit to be shifted from the property of one person to that of another, the usurper becomes the proprietor of it, in order to remove the injury he would otherwise sustain. It is different with respect to a *Modabbir*, as he is not fit to be removed from the property of one person to that of another. (The contract of *Tadbeer*, however, is sometimes annulled by order of the *Kâzee*; in which case the sale of the *Modabbir* is lawful, as it then is the sale of mere *property*, since he becomes such by the annulment of the contract.)—It is to be observed that, in ascertaining the value of the article usurped, the assertion of the usurper, confirmed by an oath, is to be credited, since the proprietor is the claimant of a large value, and the usurper is the denier of the same, and the assertion of the denier upon oath must be admitted;—unless, however, the proprietor bring evidence in support of his claim; for then the assertion of the proprietor must be credited, as being supported by evidence, which is convincing proof.—If, therefore, the substance of the article usurped appear or be found at a period when the value of it is greater than the compensation given by the usurper, and such compensation have been given in consequence of the claim of the proprietor, or of evidence adduced by him, or of the non-denial of the usurper,—the proprietor, in that case, has not the option of taking the substance of the thing usurped: on the contrary, it remains the property of the usurper, since his property in it has been rendered complete in consequence of a cause conjoined with the consent of the proprietor, inasmuch as he claimed that extent of value;—whereas if, on the contrary, the proprietor have taken a compensation in consequence of the assertion of the usurper, corroborated by an oath, he has in that case the option either to adhere to the compensation he has taken, or to take the substance of the article usurped, and restore to

the amount of which is ascertained by the declaration of the usurper upon oath,—or by evidence adduced by the proprietor;

and after accepting this, the proprietor cannot demand the article, if the compensation be given in conformity with his claim.

the usurper the compensation he may have taken; for under such circumstances the consent of the proprietor was not complete with respect to the quantity, since he claimed a larger quantity, but was obliged to take the quantity in question from his want of proof to establish the other. If, on the other hand, the substance of the article usurped be found at a period when its value is equal to, or less than, the compensation taken,—and the proprietor should have taken the compensation in conformity with the assertion or oath of the usurper, the law (according to the *Zâhir Rawâyet*) is the same as already recited; that is, the proprietor has the option of either adhering to the compensation he had taken, or of taking back from the usurper the substance of the article, and restoring to him the amount of the compensation. This is approved; because the consent of the proprietor to take the compensation in question was not complete, inasmuch as he claimed a larger sum, which he did not get, and hence he has the option, because of the non-existence of his consent.

The sale of an usurped slave by the usurper is valid upon the owner receiving the value as a compensation;—but the emancipation of him would be invalid.

IF a person usurp a slave, and sell him, and the proprietor take the value of him from the usurper as a compensation, the sale is in that case valid. If, on the contrary, the usurper *emancipate* the slave, and the proprietor afterwards take a compensation, the emancipation is not valid; because the right of property established in the usurper by his paying the compensation is defective, as being established by a retrospective reference, from a principle of necessity; (whence it is that the right of property in an usurper takes place with respect to earnings of labour, but not with respect to progeny;—in other words, if a person usurp a female slave, and take to himself the earnings of her labour, and afterwards pay a compensation to the proprietor, the earnings are in that case his property; but if she should bear children whilst in his possession, and he afterwards pay a compensation to the proprietor, the children are not his property.)—In short, the right of property established in a usurper in virtue of his payment of compensation is defective;

defective; and a defective right of property is sufficient to legalize sale, but not emancipation; in the same manner as the right of property established in a *Mokâtib* with respect to the earnings of his labour is defective; yet if he should sell a slave whom he may have earned by his labour it is valid; whereas if he were to *emancipate* him, the emancipation would be invalid.

THE fruit of an usurped orchard, and the children of an usurped female slave, together with their produce, (such as their increase of stature and beauty,) are a trust in the hands of the usurper. If, therefore, they be destroyed, he is not responsible for them;—unless, however, he should have committed a trespass with regard to them, or refused to answer the demand of the proprietor to deliver them up to him; for in these cases he is responsible. *Shafëi* maintains that the increase of an article usurped, whether it be conjoined (such as increase of stature or of beauty) or separated (such as progeny,) is a subject of responsibility; because usurpation is established with respect to it; for usurpation means *the establishment of possession over the property of another without the consent of that other*; and as this definition applies equally to any increase which may accrue upon such property, it is therefore a subject of responsibility, although the usurper have not dispossessed the proprietor of it; in the same manner as the fawn is a subject of responsibility, in a case where a person takes a deer out of an inclosure*, and it afterwards brings forth whilst in his possession, notwithstanding that it [the fawn] had not before been in the possession of any one, so as to establish a dispossession. The reasoning of our doctors is, that usurpation means “the establishment of possession over the property of another, so as to destroy the possession of the

The produce of an usurped property is a trust in the usurper's hands.

* In the text the case is supposed that of a *pilgrim* driving a deer out of the sacred territory round *Mecca*.—The translator has hazarded a small deviation from the original in this instance, merely with a view to familiarize the allusion in the mind of an *European* reader.

“*proprietor*,” (as has been already explained.) Now the possession of the proprietor had not been established, with respect to the *increase*, so as to admit the destruction of it. Besides, if the possession of the proprietor with regard to the increase be admitted by way of dependancy on his property, still his possession continues, and the usurper has not destroyed it; for it is apparent that the usurper has not hindered him from taking his increase;—yet if he refuse to give it to him upon his demand, he is then responsible to him for it; in the same manner as where he commits a trespass with regard to it, by destroying it, or killing and eating it, or felling it and delivering it to the buyer.—With respect, moreover, to the fawn before mentioned, it is not a subject of responsibility when destroyed prior to the ability of the trespasser to place it in the inclosure, because he is not, before that, guilty of any obstruction or hinderance;—in short, he is liable to responsibility only where he destroys the fawn after his ability to place it in the inclosure; and this because he is then guilty of an obstruction after the establishment of the claimant’s right*.

The usurper of a female slave is not liable for any damage she may receive by bearing a child, provided the value of the child be adequate to such damage.

If a female slave be injured by bearing a child whilst in the possession of the usurper, and the value of the child be equal to the damage sustained, the usurper is not liable for a compensation. *Shafëi* and *Ziffer* maintain that the value of the child cannot be made a remedy for the injury; because the child is the property of the proprietor of the slave; and consequently cannot be applied to remedy the damage sustained by her;—in the same manner as in the case of the fawn above recited;—that is to say, if a person drive a deer out of an inclosure, and she then bring forth a young one, and be injured by such delivery, and the value of the young be adequate to the damage, in that case the person is not only obliged to restore the deer and its

* A small portion of the text is here omitted, as it relates merely to the prohibition against trespassing upon game in the sacred territory, (round *Mecca*,) a subject the discussion of which is of little importance to the point in question, and which is treated of at large elsewhere.—(See *Seyid*.)

young one to the inclosure, but must also make good the damage sustained. It is also the same where the child dies prior to the usurper's restoration of the mother; or where the mother dies in consequence of the delivery of the child, and the value of the child is adequate to remedy the loss; or where a person sheers the wool of a sheep belonging to another, or lops off the branches of a tree belonging to another, or castrates the slave of another, or teaches him the knowledge of some art in consequence of which he is rendered in any respect defective*;—for in all these cases the person so acting is responsible for the injury, notwithstanding the value of the article be increased in consequence. The arguments of our doctors are that, in the instance in question, the cause of the increase and of the injury is the same; namely, childbirth;—and such being the case, the injury is not taken into the account, because, in opposition to it, an increase has been obtained. Hence an injury of this nature does not occasion responsibility; it being, in fact, analogous to where a person usurps a fat female slave, who afterwards becomes lean, and then grows fat again; or who loses two of her fore teeth, and then acquires two new ones;—or where a person cuts off the hand of an usurped slave whilst in the possession of the usurper, and the usurper receives the fine from him, and gives it with the slave to the proprietor;—for in all these cases no compensation for the injury is incumbent upon the usurper.—With respect to the case of the fawn, as adduced by *Ziffer* and *Shafai*, it is not admitted as applicable.—With respect, moreover, to the death of the mother, in consequence of her delivery, (as also adduced by them,) there are two opinions on record.—The first is, that if the value of the child be adequate to remedy the injury, it is then taken as such; and the second (which is according to the *Zâbir Rawâyet*) is, that the value of the child cannot be taken as a compensation for the injury, for this reason, that the delivery is not

* That is, defective in regard to the purpose for which his master had intended him; as by a loss of health, or any accident sustained in the course of his learning the art.

to be considered as the cause of the mother's death, since delivery is not necessarily connected with death, being more frequently attended with safety. Where, on the other hand, the child dies prior to the restoration of the mother, the injury is not remedied; because there was a necessity for the restoration of the original (namely, the mother) in the condition in which she was at the period of usurpation; and as she afterwards sustained an injury by the birth of a child, and the fruit of the injury (namely, the child) cannot, because of its death, be given along with the mother, it follows that the mother is not restored in the condition in which she was at the period of usurpation. With respect to the castration of a slave, it is not an increase, being an object only with some loose people;—and as to the other instances adduced by *Ziffer* and *Shafei*, the cause in them of the increase and the damage is not one and the same thing; for the cause of damage in a tree is the cutting off its branch, whilst the cause of increase is the growth; the cause of damage in a sheep is the sheering of its wool, whilst the cause of increase is the growth of the animal; and the cause of damage in the slave is the teaching or instructing him, whilst the cause of increase is the intellect of the slave.

The usurper of a female slave, impregnating her, is responsible for her value, in case she die of child-birth after restoration.

If a person usurp a female slave, and cohabit with her, and she become pregnant, and he restore her in that state to the proprietor, and she then die of child-birth, the usurper must in that case pay a compensation equal to the value which she bore on the day of her impregnation; whereas, if she were free, no compensation would be required, according to *Haneefa*. The two disciples maintain that neither is any compensation due in the case of her being a slave. The arguments of the two disciples are that, in the case in question, upon the usurper restoring the slave to the proprietor, and the restoration being made valid and complete, the proprietor is held to have received her into his property; and as, afterwards, the disorder of which she dies, namely, child-birth, is thus considered to have happened to her whilst in the possession of the proprietor, the usurper is, therefore, not

not liable for her; in the same manner as where an usurped female slave, having been seized with some disorder, such as a fever, the usurper restores her in that condition to the proprietor, and she afterwards dies in his possession; or where an usurped female slave commits whoredom with some person whilst in the usurper's possession, and he restores her to the proprietor, and she afterwards suffers punishment for whoredom, and dies of the same; in neither of which cases is the usurper responsible, any more than a seller, in the case of his selling a pregnant female slave, who afterwards dies of childbirth in the possession of the purchaser. The arguments of *Haneefa* are, that as the usurper, in the case in question, usurped the female slave at a time when the cause of destruction did not exist in her, and restored her at a period when such cause *did* exist in her, he therefore has not restored her in the state in which he took her:—consequently, the restoration was not valid and complete, being, in fact, the same as if an usurped female slave, having committed a crime in the usurper's possession, should afterwards, on account of such crime, be put to death whilst in the possession of the proprietor,—or be given up to the avenger of the offence, in consequence of her having committed the crime *inadvertently*, instead of *wilfully*,—in either of which cases the proprietor is entitled to take the whole of the value from the usurper, and so also in the case in question. It is otherwise where the woman usurped is free; because no responsibility takes place from the usurpation of a free woman, and consequently the usurper is not responsible after the restoration, although such restoration were invalid. With respect to what has been alleged of the purchase of a pregnant female slave, it is answered, that the delivery not having been incumbent upon the seller on account of his having before taken her, so as to require a delivery in the state in which he had taken her, (which is a condition of validity in the case of usurpation,) it follows that the analogy here does not hold good. With respect, also, to the case of an usurped female slave committing whoredom, and dying in consequence of the punishment on that account inflicted upon her, the

answer is, that whoredom merely occasions *scourging*, which is a cause of *pain*, but not of *death*; and therefore, in this case, a cause of *destruction* did not take place whilst the slave was in the possession of the usurper.

There is no hire for the use of an usurped article; but the usurper is responsible for any damage it may sustain.

AN usurper is not responsible for the use of the article usurped*; but if it be injured he is responsible for the damage. *Shafei* maintains that an usurper is liable for the use of a thing usurped, and consequently, that he owes an adequate rent or hire for it. It is to be observed that there is no difference between the doctrine of *Shafei* and that of our doctors, in the case where a person usurps a house and leaves it unoccupied, or occupies it himself; for in such case, according to both doctrines, the usurper is not liable for the use of it.—*Malik* maintains that if the usurper himself occupy the house he is responsible for an adequate rent; but not in case of his leaving it unoccupied. The argument of *Shafei* is that the *use* of property is estimable, (whence it is a subject of responsibility from contracts and agreements,) and consequently is a subject of responsibility from usurpation. The arguments of our doctors on this point are twofold.—FIRST, the use of an article usurped is obtained by the usurper in consequence of its occurring during his occupancy; (for it had not existed in the hands of the proprietor, as *use* is a passing accident which does not endure;) and such being the case, he is entitled to it, and consequently is not responsible for it, as no man is responsible for that to which he is entitled.—SECONDLY, there is no similarity between use and property, such as *dirms* and *deenars*; for use is an accident, whereas property is a substance. Use, therefore, cannot be a subject of responsibility in substantial property; because a similarity is requisite between the compensation and the thing for which the compensation is given.—With respect to the assertion of *Shafei*, that “the use of property is estimable,” it is not admitted, use being considered as

* Meaning, *he does not owe any HIRE for the use.*

estimable only in the case of contracts of hire, from necessity; but in the case of usurpation there exists no contract whatever.—Where, however, the article usurped is damaged, whilst in the possession of the usurper, in consequence of his use of it, a compensation for the damage is incumbent upon him, because of his having destroyed part of the substance of the thing usurped.

SECTION.

Of the Usurpation of Things which are of no Value.

IF a *Mussulman* destroy wine or pork belonging to a *Zimnee*, he must compensate for the value of the same; whereas, if he destroy wine or pork belonging to a *Mussulman*, no compensation is due.—

Shafëi maintains that in the former case also no compensation is due.

A similar disagreement subsists with respect to the case of a *Zimnee* destroying wine or pork belonging to a *Zimnee*; or of one *Zimnee* selling either of these articles to another; for such sale is lawful, according to our doctors,—in opposition to the opinion of *Shafëi*. The argument of *Shafëi* is that wine and pork are not articles of value with respect to *Mussulmans*,—nor with respect to *Zimnees*, as those are dependant of the *Mussulmans* with regard to the precepts of the LAW.

A compensation of property, therefore, for the destruction of these articles, is not due. The arguments of our doctors are that wine and pork are valuable property with respect to *Zimnees*; for with them wine is the same as vinegar with the *Mussulmans*, and pork the same as mutton; and we, who are *Mussulmans*, being commanded to leave them in the practice of their religion, have consequently no right to impose

A *Mussulman* is responsible for destroying the wine or pork of a *Zimnee*;

and must
compensate
for it by a
payment of
the value.

impose a rule upon them.—As, therefore, wine and pork are with them property of value, it follows that whoever destroys these articles belonging to them does, in fact, destroy their property of value: in opposition to the case of carrion or blood, because these are not considered as property according to any religion, or with any sect.—Hence it appears that if a *Mussulman* destroy the wine or pork of a *Zimmee*, he must compensate for the value of the pork,—and also of the wine, notwithstanding that be of the class of similars; because it is not lawful for *Mussulmans* to transfer the property of wine, as that would be to honour and respect it. It is otherwise where a *Zimmee* sells wine to a *Zimmee*, or destroys the wine of a *Zimmee*; for in these cases it is incumbent upon the seller to deliver over the wine to the purchaser, and also upon the destroyer to give as a compensation a similar quantity of wine to the proprietor, since the transfer of the property of wine is not prohibited to *Zimmes*:—contrary to usury, as that is excepted from the contracts of *Zimmes*;—or to the case of the slave of a *Zimmee*, who having been a *Mussulman* becomes an apostate; for if any *Mussulman* kill this slave, he is not in that case responsible to the *Zimmee*, notwithstanding the *Zimmee* consider the slave as valuable property, since we *Mussulmans* are commanded to shew our abhorrence of apostates. It is also otherwise with respect to the wilful omission of the *Tasmeeâ*, or invocation, in the slaying of an animal, where the proprietor considers such omission as lawful, being, for instance, of the sect of *Shafei*;—in other words, if a person of the sect of *Haneefa* destroy the flesh of an animal so slain by a person of the sect of *Shafei*, the *Haneefite* is not in that case responsible to the *Shafeyite*, notwithstanding the latter did, according to his tenets, believe the slain animal to have been valuable property; because the authority to convince the *Shafeyite* of the illegality of his practice is vested in the *Haneefite*, inasmuch as it is permitted to him to establish the illegality of it by reason and argument.

IF a person usurp wine belonging to a *Mussulman*, and convert it into vinegar by placing it alternately in the sun and in the shade,—or the skin of a carrion, and tan or dress it by the application of some valuable article,—the proprietor of the wine is entitled to take the vinegar, without giving any thing to the usurper, and the proprietor of the skin is entitled to take it, upon paying to the usurper the increase it may have received from the dressing; for, in the former case, the conversion of the wine into vinegar is merely a *purification* of it, in the same manner as the bleaching of unclean cloth; and hence the property of the vinegar continues vested in the proprietor, since a property is not created in the liquor by the operation of making it into vinegar; whereas, in the second case, a valuable article belonging to the usurper is united to the skin, in the same manner as a dye in cloth, and this case is therefore the same as the dying of a garment.—Accordingly, the proprietor of the wine is entitled to take the vinegar from the usurper without making him any compensation; and, on the other hand, the proprietor of the skin is entitled to take it from the usurper, upon making a compensation to him for the increase which it may have received from the dressing. The mode of ascertaining the amount of this increase, is by first estimating the value of the skin supposing it undressed, and then the value which it bears dressed; when the difference must be paid to the usurper. In this case, also, the usurper is entitled to detain the article usurped until he obtain his right, in the same manner as a seller is entitled to detain the goods sold as a security for the price.—If, in the cases here considered, the usurper should destroy the vinegar, or the dressed skin, he is responsible for the vinegar,—but not for the skin, according to *Haneefa*. The two disciples maintain that he is responsible for the skin also,—being entitled, however, to the increase of value from the dressing. The reason of responsibility for the vinegar is, that as it still continues in the property of the first proprietor, being, at the same time, an article of value, it follows that the usurper is liable for the destruction of it; and as vinegar is of the class of similars, he must compensate for it by a similar quantity.

A change wrought upon an usurped article by any unexpensive process does not alter the property; but if the process be *expensive*, the property devolves to the usurper, who must make a compensation.

quantity.—With respect to the skin, the reasons of responsibility for it (as maintained by the two disciples) are twofold.—FIRST, it still continues the property of the proprietor, inasmuch as he is entitled to take it back from the usurper; and as it is an article of value, it follows that, in consequence of the destruction of it by the usurper, he [the proprietor] is entitled to take from him [the usurper] a compensation adequate to the value of the dressed skin; paying him afterwards the increase of value it has received from the dressing; in the same manner as where a person usurps the cloth of another, and dyes it, and then destroys it,—in which case he is responsible for it to the proprietor, receiving from him, at the same time, the difference occasioned in the value of the cloth by the dying.—SECONDLY, the restoration of the skin dressed was incumbent on the usurper; whence, upon his destroying it, he is bound to give a consideration for it, namely, the value;—in the same manner as where a borrower destroys the article borrowed; in which case he is responsible for the value.—It is to be observed, however, that if the destruction of the skin take place whilst in the possession of the usurper, without his being the occasion of it, in that case, according to all our doctors, he is not responsible for it, whether he have dressed it by the application of something valuable, or otherwise. (With respect to what is advanced by the two disciples, “that the proprietor must take “the value of the dressed skin from the usurper, paying him afterwards the increase of value it has received from the dressing,”—it proceeds on the supposition that the value of the skin and of the operation of dressing is of different kinds,—as if the skin should be valued in *deenars*, and the workmanship in *dirms*; for if both be estimated in the same species, the proprietor must at once deduct from the value of the skin the value of the workmanship, and take the difference from the usurper; as it would be needless first to receive the whole from him, and then to pay back a part of it.)—The reasoning of *Haneefa* is, that the skin in question has been rendered valuable by the workmanship of the usurper, namely, the dressing, which is of a valuable nature,

nature, as he mixed with it valuable property;—(whence his right to detain it until he receive the increase of value from the dressing.)—The workmanship, therefore, is his right; and the skin is, with respect to its being valuable, a dependant of the workmanship, that being the original;—and as the usurper is not responsible for the original, namely, the workmanship, so neither is he responsible for the dependant, namely, the skin; in the same manner as he is not responsible where the skin is destroyed in his possession without his act. It is otherwise where the skin is extant; for in such case it is incumbent upon the usurper to restore it to the proprietor, because the restoration of it is a consequent of the proprietor's right of property, and the skin is not a dependant of the operation of dressing it, with respect to right of property, since the property of the proprietor is established in it prior to the dressing, although, whilst in that condition, it was not an article of value:—in opposition to the case of cloth, or the skin of an animal killed according to the prescribed forms; for the proprietor of these is entitled to a compensation from the usurper, as both are articles of value prior to the dressing or dying, and consequently not dependant upon the workmanship with respect to their being valuable. It is to be observed that, in the case in question, (that is, where the usurper has dressed the skin with something of value, and it remains extant in his possession,) if the proprietor be inclined to leave it in the possession of the usurper, and take from him a compensation for the value, some have said that it is not permitted to him so to do, because of the skin being of no value.—(It is otherwise in the case of dying cloth, the dye being an article of value.)—Some, again, have said that this is not permitted to him according to *Haneefa*;—but that according to the two disciples it is permitted to him; because when the proprietor refuses to take back the dressed skin, and, leaving it in the possession of the usurper, demands from him a compensation, the usurper has it not then in his power to restore it; and the case is, therefore, the same as if it had been destroyed, concerning which the two disciples and *Haneefa* have disagreed.—Some have said that, ac-

according to the doctrine of the two disciples, the proprietor is to take from the usurper the value of the dressed skin, and return to him whatever increase it may have received from the dressing, in the same manner as in the case of a destruction; whilst others have said that the proprietor is entitled only to the value of an undressed skin of an animal killed according to the prescribed form.—All that has been advanced on this topic proceeds on the supposition of the usurper having dressed the skin with something of value; for if he should have dressed it with something of *no* value, such as by means of moisture, or the heat of the sun, the proprietor is then entitled to take it from him without making him any return, since a dressing of that nature is equivalent to the washing of cloths. If, also, in this case, the usurper destroy the skin, he is responsible for the value of it in its dressed state. Some, on the contrary, have said that he is responsible for the value of it in its *undressed* state, because the dressing, as being an acquisition of his own, ought not to subject him to responsibility. The first opinion is adopted by most of the modern lawyers; and the reason of it is, that the quality of dressing, as being a dependant of the skin, cannot be separated from it; and consequently, when responsibility takes place with respect to the original [the skin] it must also operate with respect to the dependant, namely, the quality [of dressing.]

Case of converting
usurped wine
into vinegar,
by means of
mixing in it
some valuable
ingredient.

IF an usurper of wine convert it into vinegar by throwing salt into it, lawyers have said that, according to *Haneefa*, the vinegar becomes the property of the usurper without any thing being due from him; whereas, according to the two disciples, the proprietor is entitled to take the vinegar, making a compensation to the usurper for the increase of the article by means of the salt;—(that is to say, he must give him a quantity of vinegar equal to the weight of the salt.) If, on the contrary, the proprietor wish to leave the vinegar with the usurper, and take a compensation from him for its value, the same two opinions that have been given with regard to the case above recited of the dressing of a skin, prevail with regard to this case. If, also,

the usurper destroy the wine, he is no ways responsible, according to *Haneefa*,—in opposition to the opinion of the two disciples, as has been already recited in the case of dressing a skin.—If the usurper convert the wine into vinegar by means of pouring vinegar into it, in that case it is related as an opinion of *Mohammed* that, provided the wine be turned into vinegar within the hour in which the usurper poured the vinegar into it, it is his property, without his being subject to any compensation; because the pouring of the vinegar, in such case, is equivalent to a destruction of the wine; and wine is not an article of value. If, on the other hand, the wine, because of the quantity of vinegar poured into it being small, should not become vinegar until after the lapse of a considerable period, it must in that case be divided between the usurper and the proprietor, according to its measure; that is, the usurper is entitled to a part of it in proportion to the quantity poured in, and the proprietor to a part of it in proportion to the quantity of wine; because in this case the usurper has mixed his vinegar with what eventually became the vinegar of the proprietor; and this (in the opinion of *Mohammed*) is not a destruction. In the opinion of *Haneefa*, however, the vinegar, in both cases, becomes the property of the usurper; because the immediate act of his pouring vinegar into the wine is (according to him) a destruction of it; and this destruction does not, on any supposition, occasion responsibility, because if considered as a destruction of wine, it is a destruction of a thing that bears no value, or if considered as the destruction of vinegar, it is a destruction of his own property, inasmuch as the vinegar becomes the property of the usurper. According to *Mohammed* the usurper is not responsible where he destroys the liquor after its having become vinegar on the hour in which he put the other vinegar into it; for as, in this case, he acquires a right in the whole, he of course merely destroys his own property; whereas if he destroy it where it has become vinegar after a length of time, he is responsible, since in this case he destroys the property of another. With respect to what has been recited in *Kadooree*, some of our modern lawyers have said that

that it is absolute; that is, that in all conversions of usurped wine into vinegar, the proprietor is entitled to take it without making any compensation to the usurper; because the thing thrown into the wine by the usurper is of no value, inasmuch as, by the mixture of it with wine, it becomes virtually *wine*, which is a thing of no value. There are a variety of opinions concerning this case, which the author of this work has recited in the *Kafayat al Moontihce*.

A person is responsible for destroying the musical instruments, &c. or the prepared drink of a *Mussulman*,

If a person break the lute, the tabor, the pipe, or the cymbal of a *Mussulman*, or spill his *Sikker* *, or *Monissaf* †, he is responsible, the sale of such articles being lawful, according to *Haneefa*. The two disciples maintain that he is not responsible, they holding such articles to be unsaleable. Some say that this difference of opinion obtains only concerning such musical instruments as are merely used for amusement; but that if a person break a drum, such as is used in war, or a tabor or cymbal, such as are allowed to be used in celebrating a marriage, he is responsible, according to all our doctors. Some, also, say that, in decreeing responsibility, opinions are given according to the doctrine of the two disciples. By *Sikker* is understood the juice of unripe dates, which is suffered to ferment and acquire a spirit without boiling; and by *Monissaf*, the juice of unripe grapes, boiled until only one half remain. Concerning liquor boiled in the smallest degree, which is termed *Bàzik* ‡, there are two opinions reported from *Haneefa*,—one, that it is a lawful subject both of sale and responsibility,—and another, that it is not so. The arguments of the two disciples on this point are,—FIRST, that these articles are all made for the purpose of doing that which is offensive to the LAW, and therefore are not valuable property.—SECONDLY, what the person in question has done was in reformation of an abuse; and as we are directed to reform abuses

* A sort of intoxicating liquor.

† Half boiled wine. (These terms are fully explained in Book XLVI. treating of *Prohibited Liquors*.)

‡ A species of date wine.

wherever

wherever they occur, he therefore is not responsible, in the same manner as he would not be responsible if he were to destroy those articles by order of the magistrate. The argument of *Haneefa* is that the articles in question are property, as being capable of yielding a lawful advantage, although they be also capable of being used unlawfully, and therefore resemble a female finger,—whence there is no reason why they should not be considered as valuable property. As, therefore, those articles are (according to *Haneefa*) of a valuable nature, a reparation is due from the destroyer of them; and if a person were to sell them, the sale is lawful; for the obligation of reparation, and the legality of sale, depend upon an article being property, and capable of valuation, circumstances which exist with respect to the articles in question. The reformation of abuses, moreover, is committed to the hands of magistrates, as they are enabled, by the nature of their office, to carry it into effect; but it is not entrusted to others, excepting merely to the extent of verbal instruction and advice. Proceeding upon the doctrine of *Haneefa*, the destroyer, in the case here considered, is responsible for the value the articles bear in themselves, independent of the particular amusement to which they contribute. Thus if a female finger (for instance) be destroyed, she must be valued merely as a slave girl; and the same of fighting rams, tumbling pigeons, game cocks, or eunuch slaves; in other words, if any of these be destroyed, they must be valued and accounted for at the rate they would have borne if unfit for the light and evil purposes to which such articles are commonly applied; and so likewise of pipes, tabors, and other musical instruments. It is to be observed that, in the case of spilling *Sikker* or *Monissaf*, the destroyer is responsible for the value of the article, and not for a similar, because it does not become a *Musfulman* to be proprietor of such articles. If, on the contrary, a person destroy a crucifix belonging to a *Christian*, he is responsible for the value it bears as a crucifix; because *Christians* are left to the practice of their own religious worship.

and must
compensate
for them by
paying their
intrinsic
value.

The usurper of a *Modabbirá* is responsible for her value if she die in his possession; but not the usurper of a *Mo-kâtibá*.

If a person usurp the *Modabbirá* of another, and she die in his possession, he is responsible for her value; whereas, if a person usurp the *Am-Walid* of another, and she die in his possession, he is not responsible. This is according to *Haneefa*. The two disciples maintain that the usurper is responsible for the value in either instance.—The reason of this difference of opinion is, that a *Modabbirá* is universally admitted to be valuable property; and an *Am-Walid* is not valuable, according to *Haneefa*; whereas the two disciples hold an *Am-Walid* to be valuable. The arguments on both sides have been already detailed at length in treating of *Manumission*.

Chap. I. Of the Persons to whom the Right of Shaffa appertains.
Chap. II. Of Claims to Shaffa; and of Litigation concerning it.
Chap. III. Of the Articles concerning which Shaffa operates.
Chap. IV. Of Circumstances which invalidate the Right of Shaffa.

H E D A Y A.

CHAP. I.

Of the Persons to whom the Right of SHAFFA appertains.

The right of Shaffa appertains, — I. to a partner in the property of the land sold, — II. to a partner in the community and co-ownership of the land, (such as the right to water, and to roads,) — and III. to a wife. — The right of Shaffa in a partner is founded on a precept of the prophet, who said, "The right of Shaffa is in a partner, who has not divided off his share (separately) from him." — The right of Shaffa in a wife is also founded on a saying of the prophet, "The right of Shaffa is in a wife, who is not divided off from her husband."

The right of Shaffa appertains to a partner in the property of the land sold, to a partner in the community and co-ownership of the land, (such as the right to water, and to roads,) and to a wife. — The right of Shaffa in a partner is founded on a precept of the prophet, who said, "The right of Shaffa is in a partner, who has not divided off his share (separately) from him." — The right of Shaffa in a wife is also founded on a saying of the prophet, "The right of Shaffa is in a wife, who is not divided off from her husband."

BOOK XXXVIII.

OF SHAFFA.

SHAFFA, in the language of the LAW, signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. This is termed *Shaffa*, because the root from which *Shaffa* is derived signifies *conjunction*, and the lands sold are here *conjoined* to the land of the *Shafee*, or person claiming the right of pre-emption.

Definition of *Shaffa*.

- Chap. I. Of the Persons to whom the Right of *Shaffa* appertains.
- Chap. II. Of Claims to *Shaffa*; and of Litigation concerning it.
- Chap. III. Of the Articles concerning which *Shaffa* operates.
- Chap. IV. Of Circumstances which invalidate the Right of *Shaffa*.

C H A P. I.

Of the Persons to whom the Right of SHAFFA appertains.

The right of *Shaffa* appertains to a partner in the property, a participator in the immunities of the property, and a neighbour.

THE right of *Shaffa* appertains,—I. to a partner in the property of the land fold,—II. to a partner in the immunities and appendages of the land, (such as the right to water, and to roads;)—and III. to a neighbour.—The right of *Shaffa* in a partner is founded on a precept of the prophet, who has said, “*The right of SHAFFA holds in a partner who has not divided off and taken separately his share.*”—The establishment of it in a neighbour is also founded on a saying of the prophet, “*The neighbour of a house has a superior right to that house; and the neighbour of lands has a superior right to those lands; and if he be absent, the seller must wait his return; provided, however, that they both participate in the same road;*”—and also, “*A neighbour has a right, superior to that of a stranger, in the lands adjacent to his own.*”—*Shafei* is of opinion that a neighbour is not a *Shafee**;

* In other words, “*is not entitled to the right of SHAFFA;*”—*Shafee* being the term used to express the person endowed with that right.

because

because the prophet has said, "*SHAFFA relates to a thing held in joint property, and which has not been divided off:*" when, therefore, the property has undergone a division, and the boundary of each partner is particularly discriminated, and a separate road assigned to each, the right of *Shaffa* can no longer exist. Besides, the existence of the right of *Shaffa* is repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the LAW. Now, it is granted particularly to a *partner*; but a *neighbour* cannot be considered as such; for the intention of the LAW, in granting it to a partner, is merely to prevent the inconveniences arising from a division; since if the partner were not to get that share which is the subject of the claim of *Shaffa*, a new purchaser might insist upon a division, and thereby occasion to him a great deal of unnecessary vexation;—but as this argument does not hold good in behalf of a neighbour, he therefore is not entitled to the privilege of *Shaffa*.—We*, on the contrary, allege that the precept of the prophet, already quoted, is a sufficient ground for establishing the right of *Shaffa* in a neighbour.—Besides, the reason for establishing this right in a *partner* is, the circumstance of his property being continually and inseparably adjoined to that of a stranger†, (namely, the purchaser,) which is injurious to him, because of the difference of a stranger's disposition, and so forth; and certainly a greater regard is due to the partner than to the stranger who may have made the purchase, since the vexation that would ensue to the partner from forcing him to abandon a place which, from long residence, may have acquired his affections, would doubtless be greater than that to which the stranger is subjected; for, although he may thus be dispossessed, contrary to his inclination, of a property over which he has acquired a right by purchase, yet still the grievance is but inconsiderable, since he is not dispossessed without re-

* Meaning, the *Hanefites*, (in opposition to the followers of *Shafii*.)

† Arab. *Dakheel*; meaning, literally, "an arriver;" i. e. a new comer.

ceiving a due consideration;—and as all these reasons equally hold in behalf of a *neighbour*, he is therefore entitled to the privilege of *Shaffa* as well as a *partner*.—The reasons, moreover, on which *Shaffa* grounds the right of a partner, and the distinction he makes betwixt a partner and a neighbour, can by no means be admitted; since the inconveniences attending a division of property are allowed by the LAW; and are not of such a nature that the preventing of them should justify the injury which must be committed in depriving another of his property contrary to his inclinations.—The order in which we have classed the persons entitled to the privilege of *Shaffa* is founded on a precept of the prophet, who has said, “*A partner in the thing itself*” “*has a superior right to one who is only a partner in its appendages;*” “*and a partner in the appendages of the property precedes a neighbour.*” Besides, the conjunction occasioned by a partnership in the property itself is of all others the strongest; and next to it is that occasioned by a partnership in the appendages, (since here the party participates in the *immunities* of the property, which is not the case with a *neighbour*;) and a superiority of right, in every instance, depends on the strength of the cause, or fundamental principle. The vexations, moreover, and inconvenience arising from a division may be admitted as an *additional* argument, although it be not of such weight as to form a ground for injury to another.

No person
can claim it
during the
existence of
one who has
a *superior*
right,

unless he first
relinquish it,
when the title
devolves to
the next in
succession.

A PARTNER merely in the road or the rivulet, or a neighbour, cannot be entitled to the privilege of *Shaffa* during the existence of one who is a partner in the property of the land; for his is the superior right, as has been already shewn.

If a partner in the property of the land relinquish his right of *Shaffa*, it devolves next to him who is a partner in the road; and if he also relinquish his right, it falls to the *Jâr Molâfick*, or person whose house is situated at the back of that which is the object of *Shaffa*, having the entry to it by another road. *Abou Yoosâf* is of

opinion, that during the existence of a partner in the ground, whether he resign or insist upon his right, no other person is entitled to the privilege of *Shaffa*; for by his existence all others are excluded; and whilst the excluder remains the excluded have no right; as holds in inheritance.—The ground on which the *Zâbir Rawâyet* (first quoted as above) proceeds is, that the *cause* of the privilege of *Shaffa* exists with respect to each of the above-mentioned persons. The partner, however, has the superior right. Upon his relinquishing it, therefore, the one who is next to him in order of precedence will assume it;—in the same manner as holds with respect to debts contracted during health, when they came in competition with debts contracted in sickness; that is, the former are first discharged; but if the creditor whose debt was contracted in health relinquish his claim, the estate of the deceased is then appropriated to discharge the claim of him whose debt was contracted under sickness.

A person who is a joint proprietor of only a *part* of the property fold, (such as a partner in a particular *room* or *wall* of a house,) as he has a right superior to one who is neighbour to that particular part, so likewise has he a right superior to one who is a neighbour to the rest of the house. This is an approved maxim of *Abou Yoosaf*; for the conjunction holds stronger in the case of a person who is a joint proprietor of only a *part* of the house, than in that of one who is merely a neighbour. It is necessary that the road or rivulet, the joint participation in which gives a claim to the privilege of *Shaffa*, be *private*. By a *private* road is understood a road shut up at one end; and by a *private* rivulet we understand a stream of water in which boats cannot pass and repass; for otherwise it is a public river. (This is according to *Haneefa* and *Mohammed*. It is reported from *Abou Yoosaf*, that a *private* rivulet is a stream which affords water to two or three pieces of ground; but if it exceed that, it is a *public* one.)

A person who is a joint proprietor of only a *part* of the article has a title superior to a neighbour.

The relative situation of the property determines the right, when claimed on the plea of *neighbourhood*.

If a house be sold, situated in a short lane, shut up at one end, communicating through another lane, shut up also at one end, but of greater extent, in this case the inhabitants of the *short* lane only are entitled to the privilege of *Shaffa*; whereas, if a house situated in the *long* lane be sold, the inhabitants of *both* lanes are so entitled. The reason of this is, that the right of egress and regress in the short lane is participated only by its own inhabitants, whereas the right in the *long* lane appertains equally to the inhabitants of *both*;—as has been already explained under the head of “*Duties of the KÂZEE*.” The same rule also holds good in the case of a small rivulet issuing out of another.

THE laying of beams on the wall of a house gives a right of *Shaffa* from *neighbourhood*, but not from *partnership*, since this act does not constitute a partnership in the *property* of the house. In the same manner, also, a person who is a partner in a beam laid on the top of the wall is only held in the light of a neighbour.

The right of all the *Shafees* (claiming upon equal ground) is equal, without any regard to the extent of their properties.

WHEN there is a plurality of persons entitled to the privilege of *Shaffa*, the right of all is equal, and no regard is paid to the extent of their several properties. *Shafei* maintains that the right of *Shaffa* in this case is possessed by the parties in proportion to their several properties; because *Shaffa* is one of the immunities of their property, and must therefore be held, like the profits of trade, the produce of lands, the offspring of slaves, or the fruit of trees, in proportion to their respective shares in the joint property. The argument of our doctors is, that the parties being all equal with respect to the principle on which their right of *Shaffa* is grounded, (namely, a conjunction with the lands sold,) they are all consequently equal in the right itself,—whence if only *one* partner were present, however inconsiderable his share might be, he would be entitled to the whole of the *Shaffa*.—In reply, moreover, to the arguments used by *Shafei*, it is to be observed that

that the disseizing another of his property, contrary to his inclination, is not one of the immunities of property, and is very different from the profits of trade, the fruits of trees, or the like, which are produced absolutely from the property itself.

If one of the parties relinquish his right, it devolves to the others, and is participated equally amongst them; for although the grounds of their right were complete, yet they were obstructed from enjoying the entire privilege by the intervention of his right; but that right being resigned, the obstruction consequently no longer remains.

If some of the partners happen to be absent, the whole of the *Shaffa* is to be decreed equally amongst those who are present; for it is a matter of uncertainty whether those who are absent would be inclined to demand their right; and the rights of those who are present must not be prejudiced on a mere uncertainty.—If, however, the *Kâzee* should have decreed the whole of the *Shaffa* to one who is present, and an absentee afterwards appear and claim his right, the *Kâzee* must decree him the half; and so likewise if a third appear, he must decree him one third of the shares respectively held by the other two; in order that thus an equality may be established amongst them.

If some be absent, the *Shaffa* is adjudged equally amongst those who are present;—but the absentees appearing receive their shares.

If the person present should relinquish his *Shaffa* after the whole has been decreed to him by the *Kâzee*, and the absentee afterwards appear, he is in this case entitled to claim only one half; because the decree which the *Kâzee* has passed, awarding the whole to the other, absolutely extinguished one half of the absentee's right.—It were otherwise if the person present relinquish his right previous to any decree being passed by the *Kâzee*, and afterwards the absentee appear; for in this case he [the absentee] is entitled to the whole of the *Shaffa*.

The right does not operate until after the sale of the property;

THE privilege of *Shaffa* is established after the sale; for it cannot take place until it be manifest that the proprietor is no longer inclined to keep his house; and this is manifested by the sale of it. It is therefore sufficient, in order to prove the sale and establish the privilege of *Shaffa*, that the feller acknowledge the sale, although the person said to be the buyer deny it.

nor until it be regularly demanded:

THE right of *Shaffa* is not established until the demand be regularly made in the presence of witnesses;—and it is requisite that it be made as soon as possible after the sale is known; for the right of *Shaffa* is but a feeble right, as it is the disseizing another of his property merely in order to prevent apprehended inconveniences.—It is therefore requisite that the *Shafee* without delay discover his intentions, by making the demand; which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the *Kāzee*.

neither does the property go to the *Shafee* but by the surrender of the purchaser, or a decree of the magistrate.

WHEN the demand has been regularly made in the presence of witnesses, still the *Shafee* does not become proprietor of the house until the purchaser surrender it to him, or until the magistrate pass a decree; because the purchaser's property was complete, and cannot be transferred to the *Shafee* but by his own consent, or by a decree of a magistrate; in the same manner as in the case of a retraction of a grant, where the property of the grantee being completely established by the grant, it cannot be transferred to the grantor, but by the surrender of the grantee, or by a decree of a magistrate. The use of this law appears in a case where the *Shafee*, after having preferred his claim before witnesses previous to the decree of the magistrate or the surrender of the purchaser, dies, or sells the house from whence he derived his right;—or where the house adjoining to that to which the right of *Shaffa* relates is sold; for in the first of these instances the house is not a part of his hereditaments, because it was not his property; and the right of *Shaffa* fails in the second instance, as the fundamental

fundamental principle of that right is extinguished previous to his becoming the proprietor; and in the third case, he has no right of *Shaffa* with respect to the house which is sold, since the house from which he would have derived that right is not his property.

CHAP. II.

Of Claims to *Shaffa*, and of Litigation concerning it.

CLAIMS to *Shaffa* are of three kinds.—The first of these is termed *Talb Mawāfibat*, or *immediate* claim, where the *Shaftee* prefers his claim the moment he is apprized of the sale being concluded; and this it is necessary that he should do, insomuch that if he make any delay his right is thereby invalidated; for the right of *Shaffa* is but of a feeble nature, as has been already observed; and the prophet, moreover has said, “*The right of SHAFFA is established in him who prefers his claim without delay.*”

The claims are of three kinds. I. The *immediate* claim, (which must be made on the instant, or the *Shaftee* forfeits his title;)

If the *Shaftee* receive a letter which, either in the beginning or the middle, apprizes him of the circumstance of his *Shaffa*, and he read it on to the end, his right of *Shaffa* is thereby invalidated. Many of our modern doctors accord in this opinion; and it is in one place recorded as the doctrine of *Mohammed*.—In another place, however, it is reported from him, that if the man claim his *Shaffa* in the presence of the company amongst whom he may be sitting when he receives

the intelligence, he is the *Shafee*, his right not being invalidated unless he delay asserting it till after the company have broke up. Both these opinions are mentioned in the *Nawadir*;—and *Kaorokbee* passed degrees agreeably to the last quoted report; because the power of accepting or rejecting the *Shaffa* being established, a short time should necessarily be allowed for reflection; in the same manner as time is allowed to a woman to whom her husband has given the power of chusing to be divorced or not.

IF the *Shafee*, on hearing of the sale, exclaim “*Praise be to God!*” or “*There is no power or strength but what is derived from God!*” or “*God is pure!*” his right of *Shaffa* is not invalidated, inasmuch that if, immediately on pronouncing these words, he without delay claim his *Shaffa*, he will accordingly get it; because the first of these is considered as a thanksgiving on his being freed of the neighbourhood of the seller; the second (which is an expression of admiration) is supposed to proceed from the astonishment with which he is struck at the intention manifested by the seller of doing a thing which would be vexatious to him; and the last is considered as an exclamation prefatory to further discourse. None of these expressions, therefore, can imply a refusal or rejection of the *Shaffa*.—In the same manner also, if, on receiving the news of the sale, he ask “*Who is the purchaser, and how much is the price?*” it does not invalidate his right; since these questions cannot be considered as a refusal, but on the contrary it may be concluded from them that if the price be reasonable, and the purchaser a person whom he would not like as a neighbour, he will afterwards claim his right of *Shaffa*.

It is not material in what words the claim is preferred; it being sufficient that they imply a claim. Thus if a person say “*I have claimed my Shaffa,*” or “*I shall claim my Shaffa,*” or “*I do claim my Shaffa,*” all these are good; for it is the meaning, and not the style or mode of expression, which is here considered.

WHEN

WHEN news of the sale is brought to the *Shafee*, it is not necessary, according to *Haneefa*, that he assert his intention of claiming the *Shaffa* before witnesses, unless the news be communicated to him by two men, or one man and two women, or one upright man. The two disciples maintain that he ought to declare his intentions before witnesses as soon as the news is communicated to him by one person, being either a freeman or a slave, a woman or a child,—provided, however, that the person be, in his belief, a true speaker.—It is otherwise where a woman is informed that her husband has given her the power of divorcing herself; for in that case it does not signify who is the informer, or what is his character.

If the person who gives the intelligence to the *Shafee* be himself the buyer, it is not (according to *Haneefa*) in such case necessary that he be an upright man; because he is the opponent; and uprightness is not requisite in him.

THE second mode of claim to *Shaffa* is termed the *Talb Takreer wa Ish-bad*, or claim by affirmation and taking to witness;—and this also is requisite; because evidence is wanted in order to establish proof before the magistrate; and it is probable that the claimant cannot have witnesses to the *Talb Mawasibat*, as that is expressed immediately on intimation being received of the sale. It is therefore necessary afterwards to make the *Talb Ish-bad wa Takreer*, which is done by the *Shafee* taking some person to witness,—either against the seller, if the ground sold be still in his possession,—or against the purchaser,—or upon the spot regarding which the dispute has arisen; and upon the *Shafee* thus taking some person to witness, his right of *Shaffa* is fully established and confirmed. The reason of this is, that both the buyer and seller are opponents to the *Shafee* in regard to his claim of *Shaffa*; the one being the possessor, and the other the proprietor of the ground;—and the taking evidence on the ground itself is also valid; because it is that to which the right relates. If the seller have de-

II. The claim by affirmation and taking to witness, (which must be made as soon as conveniently may be after the other;)

livered over the ground to the buyer, the taking evidence against him is not sufficient, he being no longer an opponent; for having neither the possession nor the property, he is as a stranger. The manner of claim by affirmation and taking to witness is, the claimant saying "Such a person has bought such a house, of which I am the *Shafee*;" "I have already claimed my privilege of *Shaffa*, and now again claim it: be therefore witness thereof." (It is reported from *Abou Yoosaf* that it is requisite the *name* of the thing sold, and its particular boundaries, be specified; because a claim is not valid unless the thing demanded be precisely known.)

and III.
Claim by li-
tigation.

THE third mode of claim to *Shaffa* is termed *Talb Khafoomat*, or claim by litigation,—which is performed by the *Shafee* petitioning the *Kazee* to command the purchaser to surrender up the ground to him; the method of doing which will hereafter be particularly explained.

A delay in
the litigation
does not in-
validate the
claim;

IF the *Shafee* delay making claim by litigation, still his right does not drop, according to *Haneefa*. Such also is the generally received opinion; and decrees pass accordingly. There is likewise one opinion recorded from *Abou Yoosaf* to the same effect. *Mohammed* maintains that if the *Shafee* postpone the litigation for one month after the taking of evidence, his right drops. This is also the opinion of *Ziffer*; and it is related as an opinion of *Abou Yoosaf*, that the right of the *Shafee* becomes null if he delay the litigation after the *Kazee* has held one court; for, if he willingly, and without alleging any excuse, omit to commence the litigation at the first court held by the *Kazee*, it is a presumptive proof of his having declined it. The reasoning on which *Mohammed* founds his opinion in this particular is, that if the right of the *Shafee* was never to be invalidated by his delaying the litigation, it would be very vexatious to the buyer; for he would be prevented from enjoying his property, in the apprehension of being deprived of it by the claim of the *Shafee*.—"I have therefore (says *Mohammed*)

" limited

“limited the delay that may be admitted to *one month*, as being the “longest allowed term of procrastination.”—In support of the opinion of *Haneefa*, it is urged that the right of the *Shafee* being firmly established by the taking of evidence, it cannot be extinguished but by his own rejection, openly declared;—in the same manner as holds in all other matters of right.—With respect to what is mentioned by *Mohammed*, that “the delay would be vexatious to the buyer,” it is of no weight; for in case of the absence of the *Shafee*, his right is not invalidated by the litigation being delayed; and the vexation sustained by the buyer from the delay is equally the same, whether the *Shafee* be present or absent.

If it appear that the *Kázee* was not in the city, and that on *that* account the litigation was delayed, the right is not invalidated, according to the concurrent opinion of the three above-mentioned sages; for the litigation can only be made in the presence of the *Kázee*; and the delay is therefore excused.

particularly, if it be occasioned by the absence of the magistrate.

WHEN the *Shafee* goes to the *Kázee* and claims his right, alledging that “such a person has purchased a house, in which he has the “right of *Shaffa*,” the *Kázee* must first question the purchaser (the defendant in the cause) concerning the property on which the *Shafee* grounds his right of *Shaffa*; and if he acknowledge it, this is a sufficient ground for the *Kázee* passing a decree:—but if he deny it, the *Kázee* must then order the *Shafee* to bring witnesses to prove his property; for the possession, which is apparent, may be owing to other causes than property; and a thing which is thus doubtful cannot be admitted as a proof to the detriment of another. *Kadooree* alleges that the *Kázee*, before he applies to the defendant, ought to ask the plaintiff regarding the situation of the house and its boundaries; because if a man sue for the property of a house, it is requisite that he describe its situation and boundaries; and therefore he must do the same in claiming his right of *Shaffa*. When he has done this, the *Kázee*

Rules to be observed by the magistrate on an appeal,

must

must next interrogate him regarding the grounds of his right of *Shaffa*; for the grounds of *Shaffa* are various, and possibly he may set forth grounds according to his own imagination, which do not, in reality, constitute any ground. If he reply that "he is the *Shafee*, because " of his house being situated next to that which is the present object " of dispute," his claim (as *Khafaf* observes) is complete. It is also mentioned in the *Fatâvee*, that he must describe the boundaries of the house from whence he derives his right to the *Shaffa* in question.

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amining the
parties.

If the *Shafee*, being unable to bring witnesses, require that the purchaser be put to his oath, it must be tendered merely according to the best of his [the purchaser's] knowledge; (that is, he must be required to say, "By God, I know not that the plaintiff is the proprietor of the house on which he founds his claim of *Shaffa*;") because his deposition relates to a thing which is in the hands of another, and therefore he can only swear as to his own knowledge, and not positively as to the fact in question, namely, whether the house be, *for certain*, the property of the plaintiff or not.—If the purchaser refuse to swear, or the *Shafee* bring evidence, his property is proved in that house from which he derives his claim of *Shaffa*, and the neighbourhood of that house to the one in dispute is also proved. The *Kâzee* must next ask the purchaser whether he has bought the house or not? and if he deny it, the *Kâzee* must order the *Shafee* to bring witnesses to prove the purchase; for the *Shaffa* cannot be established until the sale be proved; which must be done by witnesses.—If the *Shafee* cannot bring witnesses, the *Kâzee* must administer an oath to the purchaser to this effect, that "he has not purchased the house," or that "the plaintiff is not entitled to the privilege of *Shaffa* in the " manner in which he has claimed it;" for here he swears regarding an act committed by himself, and relative to a thing which is in his own possession; and therefore it is necessary that the oath be positive as to the certainty of the fact.

THE

THE *Shafee* may litigate his claim of *Shaffa* although he do not produce in court the price of the ground in dispute:—but when the *Kázee* has decreed to him the privilege of *Shaffa*, it is necessary that he bring the price. This is the doctrine of the *Zábir Rawáyet*, as quoted in the *Mahsoot*. It is reported, from *Mohammed*, that the *Kázee* ought not to pass the decree until the *Shafee* produce the price; (and the same is also cited by *Hasan* from *Haneefa*;) because possibly the *Shafee* may be indigent, and the *Kázee* must therefore delay the decree, in order that the purchaser may not lose his property.—The reason assigned in support of the first opinion quoted from the *Zábir Rawáyet*, is that the price does not become due from the *Shafee* to the purchaser until the *Kázee* have passed his decree; and as the purchaser is not obliged to surrender up the ground previous to the decree, so in the same manner the *Shafee* (as has been mentioned above) is under no necessity of previously producing the price:—nor can there be any apprehension of the purchaser losing his property, since he has the right of detention, as will more particularly be shewn in the ensuing examples.

The cause may be litigated and determined independent of the price of the property in dispute:

WHEN, previous to the *Shafee* producing the price, the *Kázee* has commanded the purchaser to deliver up the ground [to the *Shafee*,] still he may retain it in his own hand until the price be brought to him,

but the defendant may retain the one until the other be produced.

If the *Shafee* delay to pay the price to the purchaser, after the *Kázee* has ordered him, still his privilege of *Shaffa* is not invalidated; for it has become firmly established by the litigation and the decree of the *Kázee*.

The privilege is not forfeited by a delay in the payment.

If the *Shafee* bring the seller into court whilst the house is still in his possession, he [the *Shafee*] may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the *Shafee*. The *Kázee*, however, is not

The seller may be sued whilst the house is in his possession.

in this case to hear the evidence until the purchaser also appear, as for his presence there is a twofold reason; for FIRST, the purchaser is proprietor of the ground, and the seller the possessor; and as the decree of the *Kāzee* must be against both, both therefore must be present. (It is otherwise where the purchaser has obtained possession; for then there can be no occasion for the presence of the seller, as he has become like a stranger, having neither the property nor the possession.) SECONDLY, the sale or bargain which had been concluded in favour of the purchaser is to be dissolved by *decree*; and it is therefore requisite that he be present, in order that the *Kāzee* may decree the dissolution against him.

An agent for the purchaser may be sued (before delivery to his constituent,)

If an agent on behalf of another purchase ground, the *Shafee* must sue the agent. If, however, the agent have delivered over the ground to his constituent, the *Shafee* must not institute his suit against the agent, (as he is neither the proprietor nor the possessor,) but against his constituent; for the agent then stands as the seller, and his constituent as the purchaser; and when (as has been already explained) the seller delivers up the ground to the purchaser, the *Shafee's* suit is against the latter.

and so also an agent for the seller, or an executor.

If the agent of a person who is absent sell ground on account of his constituent, the *Shafee* may claim his right and obtain the ground from the agent, provided it be in his possession. The same rule also holds in the case of an executor authorized to sell lands.

The *Shafee*, after gaining his suit, has an option of inspection, and also an

If the *Kāzee* decree in favour of the *Shafee*, at a time when he has not yet seen the property in dispute, he [the *Shafee*] has an option of inspection; and if any defect be afterwards discovered in it, he has an option from defect*, and may, if he please, reject it, notwithstanding

* Option of inspection and option from defect are fully explained under the head of SALE, See Vol. II. p. 396, and 406.

standing the purchaser should have excepted such defect from the bargain, or, in other words, should have exempted the seller from responsibility for such defect; because, as the transfer of property by right of *Shaffa* is the same as a transfer of property by sale, the *Shafee* has therefore, under both the above circumstances, the power of rejection, in the same manner as any other purchaser; and this power in the *Shafee* is not destroyed by the purchaser having seen the property, or having so exempted the seller; for he [the purchaser] was not deputed by the *Shafee*, and his act, of course, does not affect the *Shafee's* power of rejection.

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SECTION.

Of Disputes relative to the Price.

IF the purchaser and *Shafee* differ regarding the price, the former alledging *one hundred*, for instance, and the latter only *eighty*, and neither of them be able to bring any evidence, the assertion of the purchaser must be credited in preference to that of the *Shafee*; because here the *Shafee* alleges a right in the purchaser's property for a sum *short* of one hundred, which the purchaser denies; and, according to the LAW, the declaration of a defendant, upon oath, must be credited:—neither is the oath of both parties * required in this case; for the *Shafee* is plaintiff against the purchaser, but the purchaser is not plaintiff against the *Shafee*, he being at liberty either to claim or resign the thing in question; and it is a rule that both parties cannot be

In disputes concerning the price, the assertion of the purchaser, upon oath, must be credited;

* Arab. *Tabàlif*.—For a full explanation of this term see p. 83 of this Vol.

called on to swear, unless where both are in same manner plaintiff, or in same particular cases, where it is expressly ordained by the LAW, neither of which reasons exist in the present instance.

and so like-
wise evidence
produced by
him;

If both the purchaser and the *Shafee* produce evidence, that produced by the *Shafee* must be credited, according to *Haneefa* and *Mohammed*.—*Abou Yoosaf*, on the contrary, maintains that the evidence produced by the purchaser must be credited; because it proves a larger sum than the other, and it is a general rule that regard is had to the evidence which proves the most;—as where, for instance, a difference arises regarding the amount of the price betwixt a purchaser and a seller, or an agent and his constituent, or a person who buys a thing from an infidel enemy, and the original proprietor of the thing;—in all which cases, if both parties bring evidence, the evidence of him who proves the largest sum is admitted.—The difference here alluded to, betwixt one who buys a thing from an infidel enemy, and the former proprietor of the thing, will be better elucidated by the following case.—A *Mussulman* merchant goes upon a voyage, arrives in the country of the infidels, receives their protection, and, whilst he remains there, purchases a slave, who had formerly belonged to *Zeyd*, from an infidel, who had carried him away as his plunder; and, on the merchant's return, *Zeyd* claims his slave, offering the price which the merchant had given to the infidel; but a difference arising betwixt them regarding the amount of the price, both adduce evidence to prove the sum they asserted;—in which case the evidence of the merchant, which goes to prove the largest sum, is admitted, in preference to that of *Zeyd*.—In support of the opinion maintained by *Haneefa* and *Mohammed* on this point, two arguments may be urged.—FIRST, the evidence of the *Shafee* subjects the purchaser to an obligation; whereas the evidence of the purchaser does not subject the *Shafee* to any obligation, since he has it in his option to take the thing in dispute or not; and the intention of establishing evidence is to impose an obligation.—SECONDLY, if it be possible, a regard should be paid to the evidence

evidence of both parties; and here it is possible, for there is no absolute contradiction in the allegations of the two parties, since the purchaser may perhaps have *twice* purchased the thing; and both purchases being thus apparently proved, it remains in the option of the *Shafee* to prefer whichever he pleases; that is to say, if the purchaser have bought the thing twice, *viz.* once for one thousand, and another time for two thousand, the *Shafee* has it in his option to take the thing for whichever of these prices he thinks proper.—With respect to the analogy urged by *Aboo Yoosaf* betwixt the case in question and that of a purchaser and a seller differing concerning the amount of the price, it cannot be admitted; for if two different sales take place betwixt the parties, one immediately after the other, regarding the same thing, the one sale invalidates the other; and it being thus impossible to admit the allegations and evidence of both parties, that evidence which proves the largest sum must be superior; and the superiority is therefore allowed to the evidence of the seller over that of the purchaser, because it proves the largest sum. In the case of the *Shafee*, on the contrary, as the maxim of one sale invalidating the other does not affect him, both the sales hold good with respect to him;—whence if the purchaser chuse to purchase the same thing twice, the *Shafee* has it in his option to take it for either of the prices, as has been mentioned above. Besides, as an agent is supposed to stand in the place of a seller, and his constituent in that of a purchaser, the same laws will of course hold with respect to them as are established in the case of a buyer and a seller; and this is confirmed by a precept quoted from *Mohammed*, in which it is expressly said, that “the evidence brought “by the constituent is preferable.”—With respect, also, to the analogy urged [by *Aboo Yoosaf*] betwixt the case in question and that of a dispute between the purchaser of a slave from an infidel and the former master of such slave, it is entirely unfounded, since it cannot be admitted that the effect of the *branch* is the same as that of the *root*, as we find it expressly declared in the *Seyir Kabeer*, that the evidence adduced by the former master of the slave is superior. But even ad-

mitting the above-mentioned proposition, still the argument is of no weight; for in the case of the merchant two bargains could not be made successively without the one of them being invalidated; whereas in the case of the *Shafee* (as we have already observed) both bargains may be effective.

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lege a larg-
er amount.

If the feller and purchaser differ regarding the price, and the feller (supposing him not yet to have received it) alledge the smallest sum, the *Shafee* may take the house for the price alledged by the feller, the assertion made by him of a smaller sum being considered as an abatement in favour of the purchaser, of which the *Shafee* is entitled to avail himself. We shall have occasion in the ensuing section to explain the ground on which this law is founded; and shall therefore in this place assign only one reason, namely, that the right given to the *Shafee* over the feller arises from his own declaration, in saying “I have sold it for such a price;” and therefore so long as he has not received the price, his allegation must be credited regarding it,—whence the *Shafee* is entitled to take the property at a rate agreeable to his assertion.—If, on the contrary, the feller alledge the largest sum, both parties must be required to swear, and the contract of sale is then dissolved. If, in this case, either of them refuse to swear, that price is established which has been set forth by the other, and the *Shafee* is consequently entitled to take the house for that amount. If, on the other hand, both parties swear, the *Kázee*, at the requisition of one or both of them, must dissolve the sale; and the *Shafee* (whose right is not to be prejudiced by such dissolution) may then take the house for the amount alleged by the feller.

If the feller should have received the price, the *Shafee* may take the house for the amount set forth as the price by the purchaser; and here the allegation of the feller is of no weight or credit, for having received the price, the sale, as far as relates to him, is finally concluded, and he becomes only as a stranger; the dispute then lying
betwixt

betwixt the purchaser and the *Shafee*, regarding which we have already been very explicit in a former part of this section.

If the *Shafee* be not apprized of the seller's having received the price, and the seller should say "I have sold the property for one thousand *dirms*, which I have received," in this case the *Shafee* is entitled to take the property for one thousand *dirms*; for, as the beginning of the seller's speech, in which he acknowledges the sale, creates the *Shafee*'s right of *Shaffa*, the subsequent sentence, in which he asserts his having received the price, as tending to extinguish that right which he has himself created, must not be admitted. But if the seller should say "I have sold the ground and received the price," and then should add "which was one thousand *dirms*," his evidence with respect to the amount of the price cannot be admitted, because by the prior acknowledgment of his having received the price, he becomes like a stranger, and has no further concern or interest in the matter.

Cafe in which the seller's assertion may be credited concerning the price.

SECTION.

Of the Articles in lieu of which the SHAFEE may take the SHAFFA Property.

If the seller abate a part of the price to the purchaser, the *Shafee* is entitled to the benefit of such abatement; whereas if the seller, after the sale, remit the *whole* of the price to the purchaser, the *Shafee* is not allowed to avail himself of such indulgence. The reason of this distinction is, that an abatement of a *part* is an act connected with,

The *Shafee* is entitled to the benefit of any abatement made to the purchaser, but not to that of a total remission.

with, and referring to, the original bargain or sale; and the *Shafee* is entitled to the benefit of it, because that sum which remains after deducting the abatement is the price; whereas an *entire remission* has no connexion with the original bargain. In the same manner also, if the seller abate a part of the price, *after* the *Shafee* has become seized of his *Shaffa* property, he [the *Shafee*] is entitled to the benefit of such abatement, and accordingly receives back the amount abated by the seller to the purchaser.

He is not liable for any augmentation agreed upon after the sale.

IF, on the contrary, the purchaser, after the bargain is concluded, agree to an augmentation of the price in favour of the seller, the *Shafee* is not liable for such augmentation; because his privilege of *Shaffa* is established for the price originally settled; and if any subsequent augmentation were admitted to operate with respect to him, it would be a loss to him; whereas, on the contrary, any subsequent *abatement* is a *benefit*. Analogous to this case of *augmentation* is that formerly stated, in which it was remarked, that if a man make a purchase for a certain price, and afterwards renew the purchase of the same thing, and settle a large price, the *Shafee* is not prejudiced by such augmentation, but is entitled to his *Shaffa* for the price first agreed upon.

If the price consist of effects, the *Shafee* may take it on paying the value of those effects; but if it consist of similars, he is to pay an equal quantity of the same;

IF a man sell a house for a certain quantity of goods or effects, the *Shafee* is entitled to take it for the *value* of such effects; for *effects* are amongst the things denominated *Zooat-al-Keem*, or things which, being estimable, are compensable by an equivalent in money.—If, on the other hand, a man sell a house for a compensation in wheat, silver, or any other article estimable by measure or weight, the *Shafee* may take it for an equal quantity of the same article; because these are of the class of *Zooat-al-Imfâl*, or things compensable by an equal quantity of the same species. The reason of this is that the revealer

of

of the LAW * has established in the *Shafee* a right to take possession of the property of the purchaser, on giving him a compensation similar to the price which he has paid;—it is therefore necessary that a similarity betwixt the compensation and price be observed as nearly as possible, in the same manner as in cases of *destruction* of property.—(It is to be observed that articles which differ very little in their unities, such as walnuts or eggs, are included under the denomination of *Zoodt-al-Imfal*, or things compensable by an equal quantity of the same species. If, therefore, a man purchase ground for walnuts or eggs, the *Shafee* may give him a compensation in walnuts or eggs, and is not required to pay an equivalent in money.)

If a man sell a piece of ground for another piece of ground, in this case, as each piece of ground is the price for which the other is sold, the *Shafee* of each piece is entitled to take it for the value of the other, land being of the class of *Zoodt-al-Keem*, or things compensable by an equivalent in money.

If a house be sold for a price payable at a distant period, the *Shafee* may either wait until that period be expired, and then take the house for the same price,—or he may take it immediately, on paying the price in ready money: but he is not entitled to take it immediately and demand a respite to the period settled by the purchaser. *Ziffer* maintains that the *Shafee* is entitled to take the house immediately, and demand a respite of the payment; (and such also is the opinion of *Shafei*;) for the respite is a modification of the price, in the same manner as if it were stipulated to be paid in coin of an inferior species; and as the *Shafee* is entitled to take the house for the price itself, he is of course entitled to take it for the price under its modification. The argument adduced by us, in support of the former opinion, is that a delay or respite cannot be established but by a positive stipulation

and so likewise, if the price consist of land.

In case of a term of credit, the *Shafee* may either wait the expiration of the term, or take the property immediately, upon paying the price.

* Meaning, the prophet, who is often termed *Shari*, or the lawgiver.

betwixt the parties; and in the present case there is not any stipulation, either betwixt the *Shafee* and the seller, or the *Shafee* and the purchaser:—nor can the seller's consenting to a respite in favour of the purchaser be construed into a consent to respite in favour of the *Shafee*; for men, as they differ in their circumstances, are more or less capable of discharging their debts.—With respect, moreover, to the arguments used in behalf of *Ziffer's* opinion, it is true that the respite is a modification of the price; yet the law is not to be bent thereby; for the respite is, in fact, a right of the purchaser; but if it were admitted a modification of the price, it would be a right of the seller, like the price itself;—this case being analogous to where a man purchases a thing for a price payable at a distant time, and afterwards sells it again by a *tawleeat* sale;—in which instance, if no such stipulation be expressed, the second purchaser is not entitled to a term of credit,—and so here likewise.—If, in the case here considered, the land be still in the possession of the seller, and the *Shafee* take it and pay him the price in ready money, his [the seller's] claim against the purchaser ceases; for the bargain with respect to him is dissolved, and the *Shafee* is substituted in his place, as has been already explained.—If, on the contrary, the land be in the possession of the purchaser, and the *Shafee* take it from him, still the seller must allow to the purchaser the term of credit originally settled; because the bargain betwixt them is not dissolved by the *Shafee's* taking the land, and the case is therefore the same as where a person makes a purchase upon credit, and then sells the article for ready money, in which case the first seller is not entitled to demand ready money from him. It is, however, lawful for the *Shafee* to defer taking the land until the term of credit be expired: but he must make his demand without delay; for if he neglect to make an immediate demand, his right of *Shaffa*, according to *Haneefa* and *Mohammed*, becomes null:—contrary to the opinion of *Abou Yoosaf*.—The reason for the opinion of *Haneefa* and *Mohammed* upon this head is, that as the *Shaffa* has existence from the time of the sale, it is therefore requisite that the claim be made upon the
instant

instant of the sale being known. The reason for *Aboo Yoosaf's* opinion is that "the only use of the claim is to enable the *Shafee* to take "the land," which end cannot be *at present* effected, whence he remains silent; and as this silence does not argue any recession from his right, that is consequently not invalidated. To this, however, it may be replied, that the taking of the land is a matter posterior to the claim; and the *Shafee* has it, moreover, in his power to take it on the instant, by paying down the price.

If a *Zimmee* purchase land for wine or pork, and the *Shafee* be also a *Zimmee*, he [the *Shafee*] may take the land for an equal quantity of similar wine, or for the value of the pork; because a bargain of this kind is held valid amongst *Zimmees*; and as the right of *Shaffa* is enjoyed in common by both *Mussulmans* and *Zimmees*, and wine, amongst the latter, is held as vinegar amongst the former, and hogs as sheep, it follows that, vinegar being included under the denomination of *Zooât-al-Imfâl*, and sheep under that of *Zooât-al-Keem*, the *Shafee* is at liberty to take the land for an equal quantity of wine, or for the value of the pork. If, on the contrary, the *Shafee* be a *Mussulman*, he is to take the land for the value of the wine as well as of the pork; for the giving or receiving of wine amongst *Mussulmans* is prohibited by their religion, and it is therefore, with respect to them, reckoned also amongst the things which are of the denomination of *Zooât-al-Keem*.—If, on the other hand, there be two *Shafees*, the one a *Mussulman* and the other a *Zimmee*, the former must take half of the land for half the *value* of the wine, and the latter the other half, for half the *quantity* of the wine.—If, also, the *Zimmee Shafee* become a *Mussulman*, as his right is *strengthened*, not *invalidated*, by his conversion, he is therefore to take his half of the land for half of the *value* of the wine; because, by his embracing the faith, he is incapacitated from paying the actual wine, which then (as it were) becomes non-existent with respect to him;—in the same manner as where a person makes a purchase of a house for a measure of green dates, and a *Shafee*

Case of property subject to *Shaffa*, purchased by a *Zimmee* for a price consisting of unlawful articles.

afterwards appears, at a time when the season for green dates is past, in which case he must take the house for the value of the dates,—and so likewise in the present instance, as wine is, in effect, non-existent with respect to *Mussulmans*, they being prohibited, by the LAW, from using it in any shape.

SECTION.

The *Shafee* may either take the buildings or plantations of the purchaser, (paying the value) or may cause them to be removed.

IF the purchaser of ground subject to a claim of *Shaffa* erect buildings or plant trees upon it, and the *Kázee* afterwards order the ground to be delivered to the *Shafee*, it in this case rests with him [the *Shafee*] either to take the ground, together with the building or trees, paying the value of both, or to oblige the purchaser to remove them. This is the doctrine of the *Zábir Rawáyet*. It is recorded from *Aboo Yoosaf* that the *Shafee* cannot oblige the purchaser to remove his buildings; but he must either take the ground, paying the value of the trees or buildings, or relinquish the whole. This is also the opinion of *Shafei*. He, however, admits that the *Shafee* may cause the buildings or the trees to be removed, on indemnifying the purchaser in the loss he may thereby sustain. In short, according to him, the *Shafee* has three things in his option; for he may either take the land, together with the trees and buildings, paying the value of those,—or he may cause them to be removed, indemnifying the purchaser,—or, lastly, he may relinquish the whole. In support of the opinion of *Aboo Yoosaf* two arguments are urged. FIRST, the purchaser was justifiable in erecting the buildings, since the ground was his own property, and it would therefore be unjust to oblige him to remove them;—in the same manner as where ground is for a short time transferred by a grant, or by a defective sale, and afterwards taken back,—

in

in which case the granter or the seller has it not in his power to oblige the grantee or the purchaser to remove any buildings he may have raised upon the ground whilst it was in his possession,—or (in cases of *Shaffa*) where the purchaser has raised a crop of grain from the ground,—in which case the *Shafee* cannot oblige him to remove it until it be fit for reaping.—SECONDLY, in the present case one of two grievances must follow; for either the *Shafee* must suffer a grievance in being obliged to pay an enhanced price for his *Shaffa* on account of the additional value of the buildings, or else the purchaser must suffer a grievance in being compelled to remove them. Now the latter of these grievances is the heaviest, for it is a loss without any recompense; whereas the increase of price paid by the *Shafee* is not without a consideration;—and where the *Shafee* either takes the ground, paying for the trees and buildings, or relinquishes the whole, the greater of the two grievances is obviated, and the smaller one only is induced. The reasons urged in behalf of the opinion quoted from the *Zâbir Rawâyet* are, that as the purchaser has planted trees or erected buildings on ground over which the rights of another extend, without first obtaining the sanction of that other, they must be removed, in the same manner as where a person who holds ground in pledge builds upon it without the permission of the pledger.—Besides, the right of the *Shafee* is stronger than that of the purchaser, as being of prior date; whence it is that any act of the purchaser, even such as the selling or granting of the ground, may be dissolved. It is otherwise with respect to a grantee, or a purchaser under an invalid contract, (according to *Haneefa*;) because they act under a permission from the possessor of the right; and also, because the right of resumption, in cases of gift or invalid purchase, is but of a weak nature,—whence it discontinues upon the erection of buildings. The right of *Shaffa*, on the contrary, still continues in force; and therefore the rendering absolutely obligatory the value of the trees or buildings, upon the *Shafee*, in case of his claiming his right, would be absurd; in the same manner

as holds in cases of *claim of right**;—in other words, if a person purchase land, and plant or build upon it, and it afterwards prove the right of another, the purchaser recovers the price of the land and the value of the trees and buildings from the seller, and not from the *claimant of right*; and in the present instance the *Shafee* stands as the *claimant of right*. Analogy would suggest that grain also should be removed from the land; but, by a more favourable construction of the LAW in this particular, it is not to be removed; because the term of its continuance is limited and ascertainable; and as the delay may be recompensed to the *Shafee* by a rent or hire, it cannot therefore be very grievous to him.

The *Shafee* is not entitled to any remuneration for buildings erected or trees planted on land which proves the property of another:—but he may remove them.

If a *Shafee*, having obtained possession of his *Shaffa* land, erect buildings, or plant trees upon it, and it afterwards appear that the land was wrongfully sold, being the property of another, the *Shafee* recovers the price,—from the *seller*, where he had taken the land from *him*,—or from the *purchaser*, where he had taken it from *him*; because it is evident that it was wrongfully taken. He is not, however, entitled to recover from either party the value of his buildings or trees, but is at liberty to carry them wherever he pleases.—It is recorded from *Aboo Yoosaf* that the *Shafee* may also recover the value of the buildings or trees from the person from whom he received the ground; because that person, under such circumstances, is considered as the seller, and the *Shafee* as the purchaser; and it is an established rule that the purchaser may recover from the seller the value of such buildings as he has erected on the ground, if it appear that the ground sold to him was not the property of the seller, but of another person. There is, however, a difference, in this case, betwixt a *Shafee* and an ordinary purchaser; for the latter is *deceived* by the seller, and is empowered by him to take the ground,—whereas the *Shafee* is not

* Arab. *Istihkāk*, meaning; a claim set up to the subject of a sale. (See Vol. II. p. 503.)

deceived

deceived by the purchaser, nor can he be said to be empowered by him to take the ground, since the purchaser himself is *compelled*, the *Shafee* taking possession of the ground without his consent.

If a man purchase a house or garden subject to a claim of *Shaffa*, and the building (owing to some unforeseen calamity) be destroyed, or the trees decay, it rests in the option of the *Shafee* either to resign the house or garden, or to take it and pay the full price; because, as buildings or trees are mere appendages of the ground, (whence it is that they are included in the sale of land without any particular mention being made of them,) no particular part of the price is set against them,—unless where they have been wilfully destroyed by the purchaser, in which case it is lawful for him [the purchaser] to sell the appendages so destroyed, and make a profit by them, exclusive of the full price of the ground. It is otherwise when one half of the ground is inundated; for in such case the half of the thing itself being destroyed, the *Shafee* may take the remainder, paying only half the original price.

If the purchaser wilfully break down the erections, the *Shafee* may either resign his claim, or may take the area of ground for a proportionable part of the original price; but he is not entitled to the ruins, because they are become a separate property, and are no longer appendages of the ground; and the right of *Shaffa* extends only to the ground, and to things so attached to it as to be *appendages*.

If a man purchase a piece of ground, having date trees upon it bearing fruit at the time, the *Shafee* is entitled to take the fruit,—provided particular mention have been made of it in the sale, for otherwise it is not comprehended. What is here advanced proceeds upon a favourable construction. Analogy would suggest that the *Shafee* is not entitled to take the fruit; because, as the fruit is a dependant both of the tree and of the ground, (whence it is not included

If the property have sustained any accidental or natural injury after sale, still the *Shafee* cannot take it for less than the full price.

If the injury be committed by the purchaser, the *Shafee* may take the ground alone at its estimated value.

Case of a *Shafee* taking ground with fruit trees.

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in a sale of ground unless it be particularly mentioned,) it therefore resembles the furniture of a house. The reason for a more favourable construction, in this particular, is that the fruit, in consequence of its connexion with the tree, is a dependant of the land, in the same manner as an erection, or any thing inserted in the wall of a house, such as a *door*, for instance; and therefore the *Shafee* is entitled to take it. The same rule also holds where the ground is purchased at a time when there is no fruit upon the trees, and the fruit is afterwards produced whilst it [the ground] is yet in the purchaser's possession;—in other words, the *Shafee* is here also entitled to take the fruit, because that is a dependant of the original article; in the same manner as in the case of a female slave who is sold,—if she be delivered of a child previous to her being given over to the purchaser, still the child, as well as its mother, is the property of the purchaser.

In either of the two preceding cases, if the purchaser have gathered the fruit, and the *Shafee* afterwards come and claim his privilege, he is not entitled to the fruit so gathered; for it is no longer an appendage of the ground. It is said, in the *Mabsoot*, that if the purchaser have gathered any of the fruit, a proportionable abatement should be made in the price to the *Shafee*. The compiler of the *Hedaya* remarks, that this is in the *former* only of the two above-mentioned cases; for the fruit being produced at the time, and being actually and expressly included in the sale, it is natural to suppose that a part of the price was given in consideration of it; whereas, in the latter case, the fruit was not produced, and could only be included in the sale as a *consequent*, whence no part of the price could have been set against it.

C H A P. III.

Of the Articles concerning which *Shaffa* operates.

THE privilege of *Shaffa* takes place with respect to immoveable property, notwithstanding it be incapable of division, such as a bath, a mill, or a private road. *Shafei* maintains that nothing is subject to *Shaffa* but what is capable of being divided; because (according to his tenets) the end of *Shaffa* is to obviate the inconveniences attending a division of property, which does not hold in a property incapable of division. Our doctrine, however, is grounded on a precept of the prophet, who has said “*SHAFFA takes place with regard to all lands or houses.*” Besides, according to *our* tenets, the grand principle of *Shaffa* is the conjunction of property, and its object (as we have already explained) to prevent the vexation arising from a disagreeable neighbour; and this reason is of equal force whether the thing be divisible or otherwise.

The right of *Shaffa* holds with respect to all immoveable property,

THE privilege of *Shaffa* does not extend to household effects or shipping*; because of a saying of the prophet, “*SHAFFA affects only houses and gardens;*” and also, because the intention of *Shaffa* being to prevent the vexation arising from a bad neighbour, it is needless to extend it to property of a moveable nature.

It is observed, in the abridgment of *Kadooree*, that *Shaffa* does not affect even a *house* or *trees* when sold separately from the ground

unless it be sold separately from the

* The term, in the original, signifies *boats*, including every species of water-carriage.

ground on
which it
stands.

on which they stand. This opinion (which is also mentioned in the *Mabsoot*) is approved; for as buildings and trees are not of a permanent nature, they are therefore of the class of *moveables*. There is, however, an exception to this in the case of the upper story of a house; for it is subject to *Shaffa*,—whence the proprietor of the under story is the *Shafee*, as is also the proprietor of the upper the *Shafee* of the under one, notwithstanding their entries be by different roads.

A Mussulman
and a Zimmee
are on an
equality with
respect to it.

A MUSSULMAN and a *Zimmee*, being equally affected by the principle on which *Shaffa* is established, and equally concerned in its operations, are therefore on an equal footing in all cases regarding the privilege of *Shaffa*; and for the same reason, a man or a woman, an infant or an adult, a just man or a reprobate, a freeman or a slave, (being either a *Mokâtib* or a *Mazoon*,) are all equal with respect to *Shaffa*.

It holds with
respect to pro-
perty trans-
ferred in any
shape for a
consideration.

WHEN a man acquires a property in lands for a consideration, (in the manner, for instance, of a *grant* for a consideration,) the privilege of *Shaffa* takes place with respect to it, because it is in the power of the *Shafee* to fulfil the stipulation.

It does not
hold in a pro-
perty assigned
in dower, or
as a compen-
sation for
Khoola, or as
a hire, or in
composition
for murder,
or as the price
of manumif-
sion.

THE privilege of *Shaffa* cannot take place relative to a house assigned by a man as a dower to his wife, or by a woman to her husband as the condition on which he is to grant her a divorce, or which is settled on a person as his hire or reward, or made over in composition for wilful murder, or assigned over as the ransom of a slave; for with us it is a rule that *Shaffa* shall not take place unless there exist an exchange of property for property, which is not the case in any of these instances, as the matters to which the house is opposed are not property. *Shafëi* holds *Shaffa* to take place in all these cases; because, although the matter to which the house is opposed be not property, it is nevertheless capable of estimation, (according to his tenets,) and therefore

therefore the house may be taken upon paying the value of the matter to which it is opposed, in the same manner as in the sale of a property for a consideration in goods or effects. It is to be observed, however, that this opinion of *Shafei* obtains only with respect to a case where a *part* of a house is assigned as a dower, or made over as a consideration for *Khoola*, a composition for murder, and so forth; for, according to his tenets, there is no *Shaffa* except in cases of *joint property*.

If a man marry a woman without settling on her any dower, and afterwards settle on her a *house* as a dower, the privilege of *Shaffa* does not take place, the house being here considered in the same light as if it had been settled on the woman at the time of the marriage.— It is otherwise where a man sells his house in order to discharge his wife's dower either *proper* or *stipulated*; because here exists an exchange of property for property.

It holds with respect to a house sold in order to pay the dower.

If a man, on his marriage, settle a house upon his wife as her dower, and stipulate that she shall pay him back, from the price of the house, one thousand *dirms*, according to *Haneefa* the privilege of *Shaffa* does not take place relative to that house; whereas the two disciples hold that it affects a *part* of the house equivalent to one thousand *dirms* *.

THE privilege of *Shaffa* does not operate relative to a house concerning which there has been a dispute betwixt two men, compromised by the defendant (who was the possessor) paying the plaintiff a sum of money, after denying his claim; for in this case, the compromise being made after the denial, the house, in the imagination of the defendant, still belongs to him under his original right of property,

It does not hold with respect to a house the possession of which is compromised by a sum of money.

* The reasonings on both sides are here recited at large; but are omitted in the translation, as containing merely a string of metaphysical subtleties of little or no use.

and consequently no sale or exchange of property for property can here be established in regard to him;—and so likewise if he refuse to answer to the suit, and then compromise it with a sum of money,—since it may be supposed that he has parted with his money rather than be under the necessity of taking an oath, even with truth on his side, or of involving himself in litigious disputes and broils. If, on the contrary, he *confess* the justness of the plaintiff's claim, and then compromise with a sum of money, the privilege of *Shaffa* takes place; because as he has here acknowledged the plaintiff's right to the house, and retained it afterwards in virtue of a compromise, an exchange of property for property is clearly established in this instance.

It holds with respect to a house made over in *composition*:

If a defendant compromise a suit by resigning or making over a *house* to the plaintiff, after having either denied his claim or acknowledged it, or refused to answer it, the right of *Shaffa* is established with respect to the house; because, as the plaintiff here accepts the house in consideration of what he conceives to be his right, he is therefore [in adjudging the right of *Shaffa* against him] dealt with according to his own conceptions.

but not with respect to property transferred by *grant*.

THE privilege of *Shaffa* is not admitted in the case of grants,—unless when the grant is made for a consideration, in which case it is, in effect, ultimately a *sale*. Still, however, the privilege of *Shaffa* cannot be admitted, unless both parties have obtained possession of the property transferred to them by the terms of the grant; (nor if the thing granted on either side be an indefinite part of any thing;) for a grant on condition of a return is still a grant in its *beginning*, as has been already explained in treating of *gifts*. It is further to be observed that the privilege of *Shaffa* cannot be admitted, unless the return be expressed as a condition on making the grant; for if it be not so expressed, and the parties give to each other reciprocal presents, these presents on both sides are held as pure *grants*, although each of them having

having met with a requital of his generosity, neither is allowed the power of retreating.

IF a man *sell* his house under a condition of option *, the privilege of *Shaffa* cannot take place with respect to that house, the power reserved by the seller being an impediment to the extinction of his right of property: but when he relinquishes that power, the impediment ceases, and the privilege of *Shaffa* takes place, provided the *Shafee* prefer his claim immediately. This is approved.

It cannot take place with respect to a property *sold* under a condition of option:

IF, on the contrary, a man *purchase* a house under a condition of option, the privilege of *Shaffa* takes place with respect to it; for such a power reserved by the *purchaser* is held, in the opinion of all the learned, to be no impediment to the extinction of the seller's right of property; and the right of *Shaffa* is founded and rests upon the extinction of the seller's right of property, as has been already explained.

but it holds with respect to a property so *purchased*;

IF the *Shafee* take the house during the purchaser's right of option, (namely, three days,) such right ceases, and the sale is completely concluded; for the purchaser, as no longer having the house in his possession, is no longer capable of rejecting it; and the *Shafee* cannot pretend to claim the power of dissolving the bargain, since that power was founded in a condition established in favour of the purchaser only.

and on the *Shafee* taking possession, the purchaser's right of option ceases.

IF, whilst one of the parties, either purchaser or seller, has the power of dissolving the bargain, the house adjoining to the one in question be sold, he who possessed such power is the *Shafee* of the ad-

In a case of sale upon option, the possessor of the

* That is, "reserving to himself the power of hereafter dissolving the sale." (See Vol. II. p. 362 to 406.)

option is *Shaf-
fee* of the ad-
jacent pro-
perty.

joining house.—If it be the *seller*, he is the *Shafsee*, because whilst he retained the power of dissolving the bargain, his right of property remained unextinguished;—or, if it be the *purchaser*, his claiming the *Shaffa* of the second house is a proof of his inclination to keep the first, and not to avail himself of his power of dissolving the bargain:—his right of property is therefore held to commence from the time of adjusting the bargain; and in consequence of his right of property in the first house, he has the right of *Shaffa* with respect to the second. If, in this case, the *Shafsee* of the first house should afterwards come and claim his right, he is entitled to the *Shaffa* of the first house;—but he is not entitled to that of the *second*, because the first house was not his property at the time when the second was sold.

If a man purchase a house without seeing it, and afterwards, in virtue of his privilege of *Shaffa*, take the adjacent house, which happens to be sold, still his power of rejecting the first house on seeing it does not cease; for as it would not be annulled even by an *express* renunciation, it consequently is not annulled by an act which affords only a *presumption* of renunciation.

The right
does not hold
with respect
to a property
transferred
under an in-
valid sale.

THE privilege of *Shaffa* cannot take place regarding a house transferred by an invalid sale, either before or after the purchaser obtaining possession of it; for, before the purchaser obtains possession, the house belongs as usual to the seller, and his right of property is not extinguished; and after he has obtained possession there is still a probability that the bargain may be dissolved, since the LAW admits the dissolution of a sale, in a case of invalidity, in order to obviate such invalidity, an effect which could not be produced if the privilege of *Shaffa* were allowed. If, however, the purchaser put an end to the possibility of the dissolution by any particular act, such as by erecting buildings on the ground, or the like, the privilege of *Shaffa* may take place, since the impediment then no longer exists.

If the house adjacent to one which has been transferred by an invalid sale be sold whilst the one so transferred is still in the possession of the seller, he [the seller] is the *Shafee* of the adjacent house, because of the continuance of his right in the other.

The seller of a property, under an invalid sale, is still *Shafee* of the adjacent property,

If the seller have delivered over the first house, previous to the *Kázee* decreeing to him the *Shaffa* of the adjacent one, the purchaser, because of the property he has acquired in obtaining possession of the first house, is the *Shafee* of the second. It is otherwise where the seller delivers over the first house *after* the *Kázee* has decreed to him the *Shaffa* of the second; for in this case his right of *Shaffa* is not invalidated; because, after the decree of the *Kázee* has passed, it is no longer necessary that he preserve his right of property in that house from which he derived his right of *Shaffa*.

until he deliver the property sold to the purchaser, who then has the right,

If the seller take back the first house, previous to the *Kázee* decreeing the *Shaffa* to the purchaser, his [the purchaser's] right of *Shaffa* becomes null; because his right of property in that house from which he derived it has ceased previous to its being granted him by a decree of the *Kázee*. If, on the contrary, the seller do not take back the first house until after the *Kázee* has decreed the *Shaffa* of the second to the purchaser, his [the purchaser's] right of *Shaffa* is not invalidated; because, at the time it was decreed, the house from which it was derived was his property; and (as we have already observed) after the decree of the *Kázee* has passed it is no longer necessary that he preserve his right of property in that house from which he derived his right of *Shaffa*.

which, however, fails upon the seller resuming his property.

If two or more partners divide the ground in which they have hitherto held a joint property, the privilege of *Shaffa* cannot be claimed by any neighbour; because, although the division of joint property bear the characteristic of an *exchange*, yet it also bears the characteristic of a *separation*, namely, a separation of the rights of one person from those

A right of *Shaffa* is not created by partners making a *partition* of their joint property.

those of others, a thing which may be done by compulsion, since any one of the partners may cause it to be effected by an application to the *Kāzee*, notwithstanding it be contrary to the inclination of the others. It is not therefore a *pure* exchange, which admits of no compulsion, but must be accomplished by the concurrence of both parties; and the privilege of *Shaffa* is admitted by the LAW to operate only in cases of a *pure* exchange.

The right once
relinquished
cannot after-
wards be re-
sumed.

IF a man purchase a house, and the *Shafee* relinquish his privilege, and the purchaser afterwards reject it in virtue of an option of inspection, or a condition of option, or by a decree of the magistrate in virtue of an option from defect, the *Shafee* is not entitled to claim his privilege, whether the man had ever taken possession of the house or not; and so likewise, if the man, before taking possession, reject the house on discovering a blemish, without a decree of the *Kāzee*; for as, under all those circumstances, the rejection is a dissolution of the bargain, the house reverts to its original proprietor; and the privilege of *Shaffa* is not established but on the notification of a new sale. If, on the contrary, the purchaser reject the house on discovering a blemish in it, after having taken possession without a decree of the *Kāzee*,—or, if the feller and purchaser agree to dissolve the contract,—the privilege of *Shaffa* is established to the *Shafee*; because in those instances the rejection or dissolution is a *breaking off* with respect to the seller and purchaser, inasmuch as they are their own masters, and moreover *will and intend* a breaking off:—yet with respect to others it is not a *breaking off*, but is rather, in effect, a *new sale*, since the characteristic of sale, namely, *an exchange of property for property with the mutual consent of the parties*, exists in it; and as the *Shafee* is *another*, it is therefore a *sale* with respect to him, whence his right of *Shaffa* must be admitted.

CHAP. IV.

Of Circumstances which invalidate the Right of *Shaffa*.

IF the *Shafee* omit to procure evidence of his having claimed his *Shaffa* on being informed of the sale, notwithstanding his ability so to do, his right of *Shaffa* is void, because of his neglecting to claim it.— In the same manner also, if he prefer the *Talb Mawâsibat*, or immediate claim, and omit the *Talb Ish-hâd wa Takreer*, notwithstanding his ability to make it, his right of *Shaffa* is void, as has been already explained.

A right of *Shaffa* is invalidated by the *Shafee* omitting to procure evidence in due time;

If the *Shafee* agree to compound his privilege of *Shaffa* for a compensation, he thereby invalidates his right, and is not entitled to the compensation; for he has no established right or property in the place in dispute, but merely a power of insisting on becoming the proprietor in exclusion of the purchaser; and as, therefore, a renunciation of *Shaffa* (understood in renouncing all right to disturb the proprietor in the enjoyment of the property) is not a subject of exchange, it follows that no consideration can be demanded for it. As, moreover, the relinquishment of the right could not lawfully be suspended even upon a valid condition, that is, a condition proper to it, (such as a stipulation of giving up something in return which is not property,) it follows that it cannot be lawfully suspended upon an invalid condition, or condition not proper to it, (such as a condition of giving up property in return for a mere right, which is not property,) *a fortiori*. The condition of a return is therefore null, and the relinquishment of the right remains valid without a return;—and the case of a person

or by his offering to compound it;

selling his right of *Shaffa* is subject to the same rule.—It is otherwise in a case of composition for retaliation; because retaliation is a right established against the person of the murderer in behalf of the representative of the murdered, who is the avenger of his blood.—It is also otherwise with respect to a consideration received for manumission or divorce; because that is a consideration for a right of property established in the *subject* of the manumission or divorce.—Analogous to the case of relinquishment of *Shaffa* for a compensation by composition is that where a man says to his wife, being under an option of divorce, “*Chuse me, for one thousand dirms,*” or where an impotent person tells his wife that “if she will relinquish her right “ of dissolving the marriage he will give her one thousand *dirms*,” for if, in either of these cases, the wife accept the proposal, she forfeits the power she possessed, and the husband cannot be compelled to pay the compensation.—Bail for the person, also, (commonly termed *Hàzir Zàminee*,) bears a resemblance to *Shaffa* in this particular; for if a person who is bail for the appearance of a debtor apply to the creditor and prevail upon him to compromise with him, by relinquishing his claim on him as security, for a certain compensation, the surety is in this case released from his engagement, and at the same time is not liable for the compensation.—This is one tradition. According to another tradition, the surety can neither be made liable for the compensation, nor yet released from his engagement of bail. Some, also, contend that this last is the case with respect to *Shaffa*, whilst others maintain that the rule applies to bail only.

or by the death of the *Shafee* before the *Kázee*'s decree.

If the *Shafee* die, his right of *Shaffa* becomes extinct. *Shafëi* maintains that the right of *Shaffa* is hereditary.—The compiler of the *Hedaya* remarks that this difference of opinion obtains only where the *Shafee* dies after the sale, but previous to the *Kázee* decreeing him the *Shaffa*; for if he die after the *Kázee* has decreed his *Shaffa*, without having paid the price, or obtained possession of the property sold, his right devolves to his heirs, who become liable for the price. The argument

argument of our doctors upon the point in which they differ from *Shafei* is, that the death of the *Shafee* extinguished his right in the property from which he derived his privilege of *Shaffa*; and the property did not devolve to his heirs until after the sale. Besides, it is an express condition of *Shaffa*, that a man be firmly possessed of the property from which he derives his right of *Shaffa* at the time when the subject of it is sold, a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the *Shafee* remain firm until the decree of the *Kâzee* be passed; and as this does not hold on the part of the deceased *Shafee*, the *Shaffa* is therefore not established with respect to any one of his descendants, because of the failure of its conditions.

If the purchaser die, yet the right of *Shaffa* is not extinguished, for the *Shafee* who is entitled to it still exists, and no alteration has taken place in the reasons or grounds of his right. The house, therefore, is not to be sold for the payment of the purchaser's debts, or disposed of according to his testament; and if the *Kâzee* or executor sell it in order to discharge the debts of the estate, or if the purchaser have bequeathed it, the *Shafee* may render any of these transactions void, and may take the house; for the right of the *Shafee* is antecedent,—whence he has the power of annulling the purchaser's acts with respect to the property, even during his lifetime.

It is not invalidated by the death of the purchaser, and therefore cannot be disposed of on his behalf.

If the *Shafee*, previous to the decree of the *Kâzee*, sell the house from which he derives his right of *Shaffa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related;—in the same manner as where a man relinquishes his *Shaffa* without being informed of the sale, or acquits a person of a debt without knowing the amount; in the first of which cases the right of *Shaffa* is invalidated, and in the second the debtor is acquitted. It is otherwise where the *Shafee* sells his house upon a condition of option;

It is invalidated by the *Shafee* selling the property whence he derived his right;

for as, whilst a power of option remains in the feller, his property is not totally extinguished, it follows that the ground of *Shaffa* (namely, a *conjunction of property*) still continues.

or by his acting as agent for the feller.

IF the *Shafee* act as agent of the feller, and sell the house on his behalf, his right of *Shaffa* is thereby invalidated;—whereas if he act as agent for the *purchaser*, and purchase the house on his behalf, his right of *Shaffa* is not invalidated. In short, it is a rule, that if a person, as agent for another, sell the land, &c. of that other, the right of *Shaffa* in both is thereby invalidated; whereas, if an agent (such as a *manager*, for instance) *purchase* land, or so forth, the right of both continues unaffected; for the former, if he were afterwards to contest his right, must in so doing labour to annul the sale which was completed by him,—whereas the latter, in so doing, does not annul the purchase made by him, the taking of a property in virtue of *Shaffa* being itself a sort of purchase. In the same manner also, if the *Shafee* become *Zâmin be'l Dirk*, or *bail for what may happen**, by engaging to be responsible to the purchaser for the amount of the price in case the house should afterwards prove the right of another person, his right of *Shaffa* is thereby invalidated. So also, if a man sell a house, stipulating the option of a third person, meaning the *Shafee*, and he [the *Shafee*] confirm the sale, he thereby forfeits his right of *Shaffa*; whereas, if a man *purchase* a house, stipulating the option of a third person, who is the *Shafee*, and he [the *Shafee*] confirm the purchase, his right of *Shaffa* is not invalidated.

He may resume his right where he had relinquished it upon misinformation concerning the price,

IF intelligence be brought to the *Shafee*, of the house which is the subject of his right being sold for one thousand *dirms*, and he relinquish his right of *Shaffa*, and afterwards learn that the house was sold for a less price, his resignation is not binding, and he may still assert his right of *Shaffa*; for it was the dearness of the price which induced

* For an explanation of this phrase see Vol. II. p. 397.

him to resign; but upon the diminution of the price becoming known, the reason of his resignation no longer exists, and it is consequently void. In the same manner also, if news be brought that the house is sold for one thousand *dirms*, and the *Shafee* afterwards learn that it was sold for a quantity of wheat or barley equivalent to one thousand *dirms*, or even more, his resignation is void, and he may still take his *Shaffa*; because it is to be supposed that his reason for resigning it was his inability to furnish the amount of the price in that species (namely, *dirms*) for which he first heard the house was sold; but upon his understanding that it was sold for wheat or barley, it is probable that he may be able to furnish the quantity, since it frequently happens that men who are unable to pay one thousand *dirms* are capable of furnishing an equivalent, or even *more* than an equivalent, in barley or wheat. This rule also holds regarding every other article sold by weight or measure, or which differs so little in its species that it may be sold by *number*, (such as *eggs* or *walnuts*,) in the same manner as with respect to barley or wheat. It is otherwise with respect to *goods* or *effects*; for if the *Shafee*, hearing that the house is sold for one thousand *dirms*, resign his right, and afterwards learn that it was sold for *goods* equal in value to one thousand *dirms*, or more, his resignation is nevertheless binding, and he is not entitled to his *Shaffa*, because he would in this case be liable for the *price* of the goods, which consists of *dirms* and *deenars*.—So likewise, his resignation is binding if he afterwards learn that the house was sold for a certain number of *deenars* equivalent to one thousand *dirms*, or more.

If the *Shafee* be first informed that a particular person is the purchaser, and thereupon resign his *Shaffa*, and he afterwards learn that the purchaser was another person, he is still entitled to his *Shaffa*, because a man might not wish to have *one* person for his neighbour, although he may very readily chuse to have *another*. In the same manner also, if he afterwards learn that *two* persons are the purchasers, or the purchaser;

chasers, (viz. the one whose name he first heard of, and another,) he is entitled to take his *Shaffa* from the one in whose favour he had not resigned it.

or where he
has been mis-
informed con-
cerning the
article sold.

If news be brought to the *Shafee* that one *half* of the house is sold, and he resign his right, and it afterwards appear that the *whole* was sold, he must still in such case claim his *Shaffa*, since it is to be supposed that he at first resigned his right in order to avoid the inconvenience of a partner, whereas if the whole be sold there is no occasion for his being subject to any such inconvenience. If, on the contrary, the case be reversed, that is to say, if he first learn that the *whole*, and afterwards that only the *half* is sold, he is not (according to the *Zábir Rawáyet*) entitled to claim his *Shaffa*, because his resignation of the *whole* comprehended his resignation of a *part*.

SECTION.

Device by
which the
right of *Shaffa*
may be evad-
ed.

WHERE a man sells the whole of his house, excepting only the breadth of one yard extending along the house of the *Shafee*, he [the *Shafee*] is not in this case entitled to claim his privilege, because of his neighbourhood being thus cut off. This is a device by which the *Shafee* may be disappointed of his right; and it is still the same, if the seller grant the intervening part of his house as a free gift to the purchaser, and put him in possession of it.

Case of a
house pur-
chased in

If a man purchase, first, a *share* of a house, such as a third or a fourth, and afterwards the remainder,—the neighbour has the privilege of

of *Shaffa* over that share which was *first* bought, but not over that which was *last* bought; for although, as being a neighbour, he is entitled to that privilege over both, still the purchaser has a superior right to the *Shaffa* of the *remainder* of the house, as being a *partner* therein, the right of a *partner* superseding that of a neighbour, as has been already explained. If, therefore, a man wish to disappoint a neighbour of his right of *Shaffa*, he may do it by first purchasing a part of the house, for the price he means to give for the whole, excepting only a single *dirm*, which he may afterwards give as the price of the remainder.

shares, by the same person, at different times.

If a man purchase a house for a certain price, and afterwards, in lieu of that price, give a *jamma*, or gown, to the seller, the *Shafee* must take the house for the *price first settled*, and not for the value of the gown; for the exchanging of the price for the gown was a distinct and separate bargain; and the price which the *Shafee* is to pay is on account of the *house*, not on account of the *gown*. The compiler of the *Hedaya* remarks that this also is a device, by which the right of *Shaffa*, either in a partner or a neighbour, may be eluded; as the house may be sold for a price equal to twice its value, and then, in lieu of that price, a gown may be given to the seller equal to the real value of the house. Such an evasion, however, may be productive of loss to the seller in case the house should afterwards prove to have been the right of another; for then the purchaser of the house is entitled to receive back, from the purchaser of the gown, (that is, the seller of the house) the *whole price* of the house, which was much more than adequate to its value, the bargain regarding the gown remaining undissolved. There is, indeed, one mode by which the seller may avoid the risk of such a loss; and that is, by purchasing, in lieu of the number of *dirms* for which the house was sold, a quantity of *deenars*;—for, as this is a *Sirf* sale, it follows that, upon the right of another appearing to the house, the agreement becomes null, as mutual seizure, which is a condition of *Sirf* sale, does not here

Where the price of the property sold is compromised for a specific article, the *Shafee*, if he insists on his right, must pay the price.

exist; because as it here appears that the feller was not entitled to the price of the house in lieu of which he purchased or accepted *deenars*, he is obliged to restore the *deenars*, but nothing more.

A DEVICE, as above described, for eluding the privilege of *Shaffa*, is not abominated by *Aboo Yoosaf*. According to *Mohammed*, however, it is abominable; because (as he argues) the privilege of *Shaffa* is instituted solely with a view to prevent the inconvenience which might otherwise ensue to the *Shafee*; but if devices are admitted to elude and set at nought his privilege, the inconveniences which may ensue will not be prevented, and the end of the institution will be defeated. The argument of *Aboo Yoosaf* is, that as the above devices prevent the right of *Shaffa* from ever being established, the inconveniences that may accrue to the *Shafee* ought not to be considered.

SECTION.

MISCELLANEOUS CASES.

The *Shafee* may take a share from one of several purchasers; but if there be several sellers, and only one purchaser, he must take or relinquish the whole.

IF five persons purchase a house from one man, the *Shafee* may take the proportion of any one of them. If, on the contrary, one man purchase a house from five persons, the *Shafee* may either take or relinquish the whole, but is not entitled to take any particular share or proportion. The difference between these two cases is that if, in the latter instance, the *Shafee* were allowed to claim a part, it would occasion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him; whereas, in the former instance, the *Shafee* being merely the substitute of one of the five purchasers, no discrimination in the bargain is occasioned. There is no difference

difference in the law in either of these cases, whether, in making the purchase, a certain proportion of the price had been set against each proportion of the house,—or whether one price had been in general terms agreed upon for the whole; for the law is grounded only upon the discrimination in the bargain. Neither is there any difference whether the *Shafee* take his right before the purchaser has obtained possession, or delay it until after.—This is approved. It must, however, be observed, that if one of the purchasers have not obtained possession, although he have paid his proportion of the price, the *Shafee* is not entitled to take his share of the house until the rest of the purchasers have also paid their respective proportions of the price; for otherwise, a part of the house being in the possession of the *Shafee*, and a part still remaining in that of the seller, it is to be apprehended that the seller might suffer vexation from having a bad neighbour. In short, the *Shafee* here stands in the room of one of the purchasers; and one of the purchasers, on paying his proportion of the price, may not take possession of his share until the rest [of the purchasers] have also paid their proportion. It is otherwise *after* possession; for in that case the *Shafee* may assert his privilege, as the possession of the seller is then destroyed.

If a man purchase one half of a house, and afterwards the seller and purchaser make the partition betwixt themselves, the *Shafee* may either take or relinquish that half which fell to the lot of the purchaser, on which ever side it happens to be situated: but he cannot object to the partition, and insist upon a new one; for a *Shafee* is not entitled to disturb the possession of the seller; and as partition is an act of investiture, he is therefore not entitled to disturb the partition also. This is related as the opinion of *Abou Yoozaf*. It is recorded from *Haneefa*, that the *Shafee* is not authorized to take the half in question, unless it happen to be on that side next to the house from which he derives his right; for if the purchaser's lot fall in the other part of the house, he [the *Shafee*] is not the neighbour.

In case of the sale and partition of half a house, the *Shafee* may take the purchaser's lot.

IF

If one partner sell his share, the *Shafee* may annul any subsequent partition, and take it for the price.

If one of two partners in a house sell his share, and afterwards the purchaser and the remaining partner make the partition together, the *Shafee* may object to such partition, and insist upon a new one; because, as no sale took place betwixt the purchaser and the remaining partner, this partition is not, strictly speaking, an *act of investiture*, but merely an exercise of right of property; and consequently, the *Shafee* is entitled to annul it, in the same manner as he may annul any other act of property, done by the purchaser, such as *sale*, or *gift*.

A licenced slave (involved in debt) and his master may be *Shafee* to each other's property.

If a man, being possessed of a *Maxoon* [licenced] slave, involved in debt, sell his house, that slave may be the *Shafee* of it. And in the same manner also, if such a slave sell a house, his master may be the *Shafee* of it; for the act of taking a property by privilege of *Shaffa* stands as a *purchase*; and purchase and sale is admitted betwixt them, as being attended with advantage, since it is here considered to be on behalf of the creditors. It is otherwise where the slave is not involved in debt; for then, if he sell a house, it is on account of his master; and the man on whose account the house is sold cannot be the *Shafee*.

Acts of a father or guardian with respect to the *Shaffa* of an infant ward.

If a father or guardian resign the right of *Shaffa* belonging to their infant ward, such resignation is lawful, according to *Abou Yoosaf* and *Haneefa*. *Mohammed* and *Ziffer* say that it is not lawful; and that, the right of the infant *Shafee* being still extant, he is entitled to claim it as soon as he attains maturity. The learned in the law observe that there is the same difference of opinion in the case of a father or guardian *omitting* to make the claim of *Shaffa* on being apprised of the sale of the house;—or of an agent resigning the claim before the tribunal of the *Kásee*. The arguments used by *Mohammed* and *Ziffer* are two-fold.—FIRST, it is alleged that, the right of *Shaffa* being firmly established in the infant, the father or guardian have not the power of annulling it, any more than of annulling his right to a fine of blood or retaliation.—SECONDLY, their authority over the affairs of the infant is vested in them in order that they may prevent him from suffering any

any injury; and if they were to annul his right of *Shaffa*, they would *occasion* an injury instead of *preventing* one. The arguments, on the other hand, in support of the doctrine of *Aboo Yoosaf* and *Haneefa* are likewise twofold.—FIRST, the taking by privilege of *Shaffa* is virtually traffic, since it stands as *purchase*; and the father or guardian may therefore reject it, in the same manner as a thing offered for sale.—SECONDLY, the taking by privilege of *Shaffa* is an act of a doubtful tendency, as it may either be productive of loss or of gain: the relinquishing of it may therefore be sometimes the most for the minor's benefit, inasmuch as the price of the house will still remain his property; and as the power of a father or guardian is granted them with a view to the benefit of the infant, they ought consequently to have the power of rejection.

THE silence of the father or guardian, or their omitting to claim the *Shaffa*, being considered as a *rejection*, annuls the right. It is to be observed that the difference of opinion above mentioned obtains only in cases where the house in the neighbourhood of the infant is sold for a price nearly adequate to its value: but that where the house is sold for *more* than its value, beyond what appraisers would rate it at, and which it would be most adviseable to avoid, some say that the resignation of the father and guardian is admitted to be lawful by all authorities, as being purely *advantageous*; whilst others, on the contrary, maintain that, according to all, it is not lawful; for as the father and guardian are not empowered, in such a case, to take the *Shaffa*, so also they are not empowered to *reject* it, but are as *strangers*; and the right of the infant still continues to exist.

IF a house in the neighbourhood of an infant be sold for a price much inferior to its value, it is recorded as an opinion of *Haneefa* that in such case the resignation of a father or guardian is invalid.

ERRATA in the THIRD VOLUME.

Page 12, (in the note,) *for* re-emption, *r.* pre-emption.

13, line 6, *for* "in case of the *Sirf*," *r.* "in the case of *Sirf*."

33, — 26, — *mean*, *r.* *means*.

36, — 12, — *de nove*, *r.* *de novo*.

63, — 6, — *Takhâlif*, *r.* *Tahâlif*.

70, — 21, — *every*, *r.* *any*.

133, — 30, — *has*, *r.* *his*.

178, — 25 and 28, *for* *Shafa*, *r.* *Shaffa*.

183, — 15 to 29, *for* *Shafa*, *r.* *Shaffa*.

433, — 18, *for* "so likewise," *r.* "and so likewise."

468, (title,) — *Hijbr*, *r.* *Hijr*.

ERRATA in the THIRD VOLUME.

Page 124 in the note. For "corruption" read "corrupt".
Page 125 in the note. For "in each of the two" read "in the case of the two".

